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MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-564

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,
Petitioners,

v.

CHARLES JAMES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

HARRY TREININ,
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Corning, N. Y. 14830
607 962-3167.

Dated: September 29, 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY AND CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

v.

CHARLES JAMES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners, the Board of Education of Central District No. 1 of the towns of Addison, *et al.*, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 24, 1972.

Opinions Below.

The opinion of the Court of Appeals, 461 F. 2d 566, appears in the appendix hereto. The opinion rendered by the District Court for the Western District of New York also appears in the appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on May 24, 1972. A timely petition for rehearing *en banc* was denied on July 12, 1972, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Does a teacher have a constitutional right to wear an emblem expressing his personal political views on an emotionally-charged political issue dividing the country, contrary to his own professional Code of Ethics and the direction of the Commissioner of Education in a class where he is teaching English poetry, without presenting the entire range of information available in relation to such issue?

2. Is a determination of the New York State Commissioner of Education on a hearing instituted by the respondent in which all of his constitutional rights were presented *res adjudicata* in this case where he is proceeding *de novo* without having sought a review of the Commissioner's decision either in the state or federal courts?

3. Was a substantial federal question presented to the court below?

Statement of the Case.

The events which give rise to this action arose in conjunction with the observance of the Viet Nam Moratorium Days on November 14 and December 12, 1969.

In countless cities across the land, demonstrations against the policy of the government in reference to its conduct of the Viet Nam War were taking place. Stories

of the demonstrations monopolized the news media. Every television news broadcast gave priority to pictures and reports of the demonstrations in our cities. The events were headlined in our newspapers. Never before had Washington witnessed so huge a crowd gathered to protest action of our Government.

There was demonstrated a great division of our people.

It is in this context—a nation divided—protest throughout the land—noisy clamor on the part of many against the Government—equally as many, if not more, determined that the action of the Government be upheld—that respondent's actions must be judged.

On the first Moratorium Day, respondent, a probationary, teacher, appeared before his English class wearing a black armband.

Mr. Pillard, the school superintendent, asked that the armband be removed. Respondent refused. He was asked to see Mr. Brown, the district principal.

Mr. Brown explained to Mr. James that he considered the wearing of the black armband a symbol constituting political activity; that he thought it unethical for Mr. James, as a teacher, to use the school as a forum for expressing his personal political views, either symbolically or vocally.

Respondent was assured that there was no question as to his right to hold the political views which he apparently held or to participate in any political activities he might desire when not on duty as a teacher; that there was no question but that teachers could and should

discuss controversial issues in school when they were timely and pertinent to the course being taught, but that the right, so exercised, also carried with it the obligation to present, objectively, all known points of view on the issues. That, even then, the teacher could let it be known what his personal views were, if he pointed out and emphasized the rights of others to hold opposing views.

Mr. Brown further pointed out that, in his opinion, the wearing of the armband would tend to be disruptive and encourage pupils to engage in disruptive demonstrations; that the action would have a divisive effect on teachers.

Mr. James refused to remove the armband and was informed that he was suspended (App. 21a-24a).

After a meeting held the next day, the Board of Education sent a letter to Mr. James (App. 33a).

It stated:

> "The Board deems your action to be a political act. As such, it is prohibited in the school. It is also deemed unethical action on the part of a teacher to engage in such activities.
>
> "You may return to class on Monday, November 17th, 1969, with the understanding that you engage in no political activity while in the school.
>
> "Of course, the Board recognizes fully your absolute right to express outside of the school any beliefs that you may have."

Respondent returned to his duties on Monday, November 17th, 1969. He voiced no disagreement with the conditions for his return as set forth in the letter.

Thereafter, on the second Moratorium Day on Friday, December 12th, 1969, without any explanation or notification to the Board, Mr. James again wore an armband. He was asked to remove it. Upon his refusal to do so, he was suspended.

Under the authority of and in compliance with the provisions of Section 3013 of the Education Law of the State of New York, upon recommendation of the District Superintendent, the Board of Education dismissed Mr. James.

Mr. James petitioned the New York State Commissioner of Education for reinstatement. This was denied (App. 25a).

Thereafter, he brought this action invoking jurisdiction under Title 28 J.S.C. 2201 *et seq.* and Title 28 U.S.C. 1983 *et seq.* (App. 3a).

Reasons for Granting the Writ.

1. The determination in the court below affects the rights and obligations of every teacher in the public schools in the United States as well as the nature of the education that may be received by the pupils.

The decision herein affects the nature of the educational process to be permitted in the classroom.

The decision validates the action of a teacher in a classroom espousing a political position at the time of intense political turmoil involving an issue on which the position was taken.

This court in *Tinker v. Des Moines Independent Community School District*, 89 Sup. Ct. 733, page 74, recog-

nized that the black arm bands were worn by the children in that case.

> "• • • to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their view known, *and by their example, to influence others to adopt them.*"[1] (Italics supplied.)

Thus, as far as can be found, for the first time a decision has been rendered determining that it is permissible for a teacher in a junior high school to express his partisan position on a political issue dividing the country. More important, approval is given to the display of partisanship under circumstances which do not afford the opportunity to discuss the issues involved or the expression of other views on the issue presented.

We have action sanctioned which was contrary to the Code of Ethics adopted by the New York State Teacher's Association.[2]

---

[1]In his reply in the proceeding before the Commissioner, "(Respondent) admits and alleges that the wearing of the armband by respondent was a symbol of an opinion of (respondent) and was intended to convey to all who cared to observe the opinion and association of the (respondent) with respect to the acts of the administration of the Government of the United States and its conduct of the war in Viet Nam, but denies each and every allegation in paragraph 12 of the answer, including, but not limited to, the allegation that the wearing of the armband was partisan politics, including the allegation that the wearing of the armband was contrary to the ethics of the teaching profession and that the wearing of the armband constituted improper conduct on the part of the respondent."

[2]"4. The teacher and the school board recognize their obligations to develop growing appreciations and understanding of the principles of democracy; *they refrain from using the school to promote personal views on religion, race or partisan politics*"

The action was also in violation of a directive of the New York State Commissioner of Education issued in anticipation of the observance of the Moratorium Days (p. 34a, App.).[2]

Counsel could only find two cases in which the rights of the teacher in the classroom in relation to the discussion of a political subject was determined.

(footnote continued):

(p. 8, Code of Ethics, Their Interpretation and a Bill of Rights for Teachers). (Italics supplied.)

"In fulfilling his obligation to the student, the educator:

"1. Shall not, without just cause, restrain the student from independent action in his pursuit of leaning and *shall not, without just cause, deny the student access to varying points of view.*" (Italics supplied.)

"2. Shall not deliberately suppress or distort subject matter for which he bears responsibility."

COMMITMENT TO THE PUBLIC

"In fulfilling his obligation to the public, the educator:

"4. Shall not use institutional privileges for private gain or to *promote political* candidates *or partisan* political activities." (Italics supplied.)

"31. The professional teacher exercises good judgment in political activity. He properly may urge friends and acquaintances to support school bond issues or to vote for candidates in any election. *The use of school time or school premises for partisan political activity is improper*" (p. 17, Code of Ethics). (Italics supplied.)

[2]After discussing the problem of whether or not school should be closed on Moratorium Days, it gave its attention to the manner in which any special activities related to the significance of the day should be carried on. The directive continued

"We would recommend that consideration be given to the following factors:

• • •

In *Goldsmith v. Board of Education,* 66 Cal. App. Div. 157, 255 Pac. 783 (1924), the court in upholding the suspension of a teacher, used the following language:

> "It is to be observed that the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office introduces into the school questions wholly foreign to its purposes and objects; that such conduct can have no other effect than to stir up the students over a contest for a political office, and the result of this would be inevitably to disrupt the required discipline of a public school."

Recently, the subject was considered in *Goldwasser v. Brown,* 417 F. 2d 1169, cert. den. 397 U. S. 922. Plaintiff was dismissed for discussing foreign policy and racial prejudice in his classes.

The dismissal was upheld despite the claim that it interfered with plaintiff's right to free speech.

The court pointed out that appellant was fired for what he said *within* the classroom; that his job was to teach foreign officers English—not current events, political science, sociology or international relations (p. 1177). In our case, also, appellant was engaged in teaching English.

(footnote continued):

> "3. *The school posture should be neutral and objective. Administrators and staff members should avoid taking positions* on controversial matters which may reflect on the objectivity of the school.
>
> "4. If controversial statements are to be made by others, *efforts should be made to assure that all sides of the question are given appropriate attention.*" (Italics supplied.)

In its decision, the court defined the competing interests of the parties as follows:

> "Government's interest as an employer is in heightening the level of the public service it renders by assuring the efficiency of its employees in the performance of their tasks; and efficiency comprehends the maintenance of discipline, the prevalence of harmony among co-workers, and the elimination of conduct which may reasonably be thought to have 'impleaded the proper performance' by a teacher of 'his daily duties in the classroom.'
>
> "Conversely, the free speech interest of the teacher is to have his say on any and every thing about which he has feelings, provided there is no significant likelihood of his impairment of his efficiency" (p. 1176).

The court held:

> "• • • observations on Vietnam • • • would appear to have, at best, minimal relevance to the immediate classroom objectives."

The court stresses that appellant was fired for what he said *within* the classroom— and not for airing his views outside the classroom to anyone who would listen.

Thus, we have a situation parallel to our case and the distinction from the *Tinker* case pointed out.

The net result of the decision below is that a teacher is permitted to express his political beliefs in the absence of discussion of those beliefs or of an opportunity for the expression of other views on the issue presented.

That it was done silently and without comment makes it all the more objectionable. Literally, a placard es-

posing a political cause is placed before the students, and given the imprimature of the teacher; no comment is made and no discussion that might lead to the exposure of differing views is invited.

With the well-known inclination of youngsters to emulate their teachers and follow their examples, the effect of this display of the teacher's political position requires no further comment.

In its decision in the court below, the court started its analysis of the *Tinker* case with the quotation that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the school house gate," 292 U. S. at page 506.

From this starting point, the entire decision apparently proceeds on the premise that the position of the teacher and the pupil in reference to the right of free speech is identical. Little cognizance is given to the fact that once beyond the school house gate, pupil and teacher assume entirely different roles; that the student, by law, is required to attend; that the teacher is hired to teach—English in this case. Sight is lost of the fact that the teacher in the classroom is the representative of the Board and occupies a position of authority; his words carry weight and his examples are to be followed. While the student is accepting learning, the teacher is imparting education. By acting as he did, Mr. James violated not only the Code of Ethics of his profession and the directive of the Commissioner of Education, but the very essence of the American educational system • • • "to present a fair summary of the entire range of opinion so that the student may have complete access to all facets and phases of the subject." Commissioner of Education Decision (p. 30a, App.).

It is to be noted, that in the *Tinker* case, the decision specifically pointed out that

> "* * * there is here no evidence whatever of petitioners' interference, actual or nascent, with the schools work or of collision with the right of other students to be secure and to be let alone. Accordingly, *this case does not concern speech or action that intrudes upon* the *work of the school* or *of the right* of other *students*." 89 Sup. Ct., p. 733. (Italics supplied.)

Apparently, the court below equates "interference" with "the school's work or collision with the rights of other students" in connection with the necessity of a showing of a forecast of "substantial disruption of or material interference with school activities * * *" (p. 3247).

The function of the school is to teach its students. Disruption of its functions is not brought about by physical violence alone. Much greater violence can be done to the educational process by the improper exercise of the teacher's duty—to teach; to teach all relevant points of view on a controversial subject—not to project his personal opinion to the exclusion of all others.

Disruption of the educational process is not by riot alone. At worst, that is transitory. More damage can be effected by indoctrination of personal political belief. The damage is more subtle and longer lasting.

An interesting sidelight on this phase of the case was afforded during argument in the Circuit Court. During discussion as to whether a showing of physical disruption was required to be shown, petitioners' counsel inquired, "Do we have to wait until the house burns down before we can call the fireman?"

One of the judges, placing his head in his hands replied, "Counsel, under the first amendment cases, I am afraid you are right."

If that be the state of the law, applicable to the classroom situation, a persuasive argument for the grant of this petition is presented.

The heart of the educational issue presented in this case was well stated by the Commissioner of Education of the State of New York in his decision on the appeal of Mr. James in which the position of the school board was upheld. There the Commissioner stated (p. 30, a, App.):

> "It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. *If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facts and phases of the subject.* Petitioner, in this case, in wearing the black arm band in his classroom was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists." (Italics supplied.)

The decision of the Commissioner was in conformity with the memorandum previously sent by the Commissioner's office in reference to the conduct of schools on Moratorium Days and with the Teacher's Code of Ethics.

The conflict presented in this case between the extent of the rights of teachers to freedom of personal expression in the classroom, the nature of the obligation of teachers as to teaching duties, the rights of students as

to what they are to be taught; the very essence of our educational system are involved in the determination of this case. It is respectfully submitted, the problems deserved the attention of the court.

If for no other reason, this court should pass on the case to expunge from the record the statement by the court below at page 3248, that

> "a principal function of all elementary and secondary education indoctrinative—whether it be to teach the ABC's or multiplication tables *or to transmit the basic values of the community.*" (Italics supplied.)

To claim that education is indoctrinative immediately brings to mind the systems of education of Communist Russia, Nazi Germany or Facist Italy.

Particularly is this so if we accept the definition of indoctrination by Dewey, one of the great philosophers on the American educational scene. He stated that

> "I shall take indoctrination to mean the systematic use of every possible means to impress upon the minds of pupils a particular set of political and economic views to the exclusion of every other" (*Education Today,* Putnam, 1940, p. 356).

Quite to the contrary, the function of American education has always been considered to train the mind to evaluate, to discern, to receive as much information on any given subject as is available and then to be so trained as to be able to choose what to the individual is the more valid choice. For no other reason, certiorari should be granted so that this court may have an opportunity to reject the intimation of the court below and to restate the function of American education as described in *Wieman v. Updegraff,* 344 U. S. 185, page 196:

> "It is the special task of teachers to foster those habits of open mindedness and critical inquiry which alone make for responsible citizens, who in turn make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept in practice by the very atmosphere which they generate; *they must be exemplars of openmindedness and free inquiry.*" (Italics supplied.)

Or, as stated, conversely, in *Epperson*, 393 U. S. 97 (1968):

> "There is, and can be no doubt, that the First Amendment does not permit the State to require that the teaching and learning must be tailored to the principals or provisions of any religious sect or dogma."

Can it be denied that if the state required that Mr. James wear the black arm band on the Moratorium Days that such action on the part of the state would be unconstitutional? Why should a teacher, on his own volition, have the same authority to affect the education and thinking of his students that would be denied him if he were acting in his capacity as an agent of the state? The reason for the action—whether state directed or teacher inspired is of little moment. The action taken is the same. The result from the point of view of the student is equally objectionable.

Or, as stated in *Barnett*, 319 U. S. 624, 637:

> "Free public education if faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party or faction."

In effect, the decision below gives a teacher the right to wear any symbol, expressive of any political view,

without hinderance. Granting a teacher the right to wear a black arm band as a symbol of opposition to government action is to start on a course that may lead to disaster in our schools.

Once that right is granted, the right could not be denied to others who agree with plaintiff. Then, a similar right must be granted to those who disagree with plaintiff and his adherents.

Let us assume that we have a school with fifty teachers. Ultimately, we may have twenty-five who favor one course of political action with possibly the other twenty-five proclaiming an opposite point of view.

Is that the setting that is desirable for the operation of a school or for the education of our children?

The issue can then be extended beyond Vietnam. The question of race could be so debated. Who could then deny the Black Panther the right to wear the symbol of his cause or the Ku Klux Klan member the right to wear the symbol of his political faith or social belief.

Could we then deny the Nazi the right to wear his swastika or the Communist his hammer and sickle?

This is what is involved in this case—The integrity of the schoolroom—Whether or not the school should become a battleground for opposite political faiths each seeking adherents not only on the faculty but, above all, in the classroom among the students.

Already, we are witnessing in some of our schools the sorry spectacle of policemen patrolling the corridors to keep the peace between opposing groups of students.

No action should be taken which may pave the way for the possibility that we multiply the issues requiring such action.

The power and influence of a symbol was recognized in the New York case of *O'Connor v. Hendrick* (184 N. Y. 421).

The Court of Appeals had before it the question as to whether a Catholic Nun should be permitted to teach in a public school while wearing a distinctive religious garb.

The Commissioner promulgated an order prohibiting teachers from wearing the costume in question while engaged in the actual work of teaching.

What the courts there said about the religious garb is equally applicable to the black arm band worn by respondent.

> "There can be little doubt that the effect of the costume worn by the Sisters of St. Joseph's at all times in the presence of their pupils would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong. To this extent, the influence was sectarian even if it did not amount to the teaching of denominational doctrine" (p. 428).

To paraphrase—by the same token, the wearing of his symbol by respondent would inspire respect and sympathy for his belief even if it did not amount to the teaching of political doctrine.

Discussing the reasonableness of the regulation of garb worn by teachers, the court makes a statement peculiarly apt to the facts in this case.

> "So also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils. For example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July" (p. 429).

No one argues against the discussion of the issues of the Vietnam War or any other political issues in our schools. They should be argued and discussed—discussed fully and completely in the proper classes and at the proper times by teachers acting as teachers and not by teachers acting as partisans.

Mr. James advertised a political position. That is what made his actions objectionable. For the arm band, like the billboards or the newspaper ad, is the projection of an idea. It propels its message—it asks no comment in return and it invites no discussion. It states its position repeatedly, and in the classroom the student does not possess the option to put the newspaper aside or to click off the television set.

2. The determination of the Commissioner of Education of the State of New York should be considered *res adjudicata*.

Originally, Mr. James appealed to the Commissioner of Education of the State of New York. That appeal arose out of the same circumstances as the present case.

On the appeal, before the Commissioner, however, appellant did not mention the free exercise of religion.

When he sought legal relief, Mr. James had a choice: (1) to appeal to the Commissioner; (2) to take his case

directly to the New York Supreme Court; (3) to take his case directly to federal court.

On his own free choice he elected to petition the Commissioner.

In this case, Mr. James is not seeking to review the decision of the Commissioner. He is proceeding *de novo* as if the proceeding before the Commissioner has never been held.

The district court held that since the plaintiff did not appeal from the Commissioner's decision, as he had a right to do, but instead brought this action, that "the questions raised by the complaint in this action are *res judicata*" (p. 66a, App.).

Taylor v. New York City Transit Authority, 309 F. Supp. 785, aff'd 433 F. 2d 665 (2nd Circuit, 1970), specifically referred to the New York State Education Law, Section 310, under which Mr. James proceeded, refers to the available election of remedies and holds that such judicial decisions are final, precluding action in the federal courts.

If the Commissioner's action is found to be arbitrary or capricious appeal could be had to the New York courts, *Bond v. Dentzer* (NDNY), 325 F. Supp. 1343.

One cannot reinstitute the same cause of action against the same individual, based on the same array of facts, merely by changing legal theories and sovereignties. *Howe v. Brown*, 426 F. 2d 300. See, also, *Nelson v. Los Angeles County*, 362 U. S. 1, 9.

> "The Civil Rights Act does not permit a second bite at the cherry." *Lackawanna Police Benevolent Association v. Balen*, 446 F. 2d 52.

3. The "serious adverse effects on the New York State school system" of the decision below foreseen by the Commissioner of Education of the State of New York warrant review by the court.

The New York State Commissioner of Education has been permitted to join an *amicus curiae* by the District Court. Both there and in the Circuit Court, briefs have been filed on his behalf. The effects of the decision below on the educational system as visualized by the man who heads the system is forcefully set forth in a letter by his counsel addressed relative to a petition for a rehearing *en banc*. The letter is appended to this petition.

The fact that the chief education officer of the State of New York claims that the decision will have "serious adverse effects on the New York State School system," by itself, is sufficient to warrant the granting of the petition.

4. Previous decisions of the Supreme Court indicate the absence of a substantial federal question.

The decision in the *Goldwasser* case, 417 Fed. 2d 1169, cert. den. 397 U. S. 922, denies the right of a teacher in the classroom to propagandize his personal views on political and social issues, disposes of the issues presented.

Likewise, the decision on *West Virginia v. Barnett*, 319 U. S. 624, in which it is stated:

> "That no official • • • can prescribe what shall be orthodox in politics • • •"

and that

> "* * * free public education * * * will not be partisan or enemy of any class, creed, party or faction"

corroborates that contention.

Even in the absence of any compelling reasons for the observance of neutrality in the propagandizing of personal political views (as are present in the case under review), the freedom to the expression of one's views has been restricted.

> *Adderley v. Florida*, 385 U. S. 39, 87 S. Ct. 242 (1966);
> *Cox v. Louisiana*, 379 U. S. 536 at 554-555, 85 S. Ct. 453, 379 U. S. 559 at 563-564, 85 S. Ct. 476.

No substantial federal question was presented by the claim of want of due process in the dismissal without a hearing of a non-tenure teacher.

> *Board of Education v. Roth*, 405 U. S. —, 92 S. Ct. 2701;
> *Fenton v. Boston School Board Committee*, 26 N. E. 2d 676, cert. den. 401 U. S. 929.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: September 29, 1972.

Respectfully submitted,

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APPENDIX.

Opinion and Judgment of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 697—September Term, 1971.

(Argued May 5, 1972 Decided May 24, 1972.)

Docket No. 72-1109

CHARLES JAMES,

Appellant,

v.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY AND CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Appellees.

Before:

Kaufman, Anderson and Mansfield,
Circuit Judges.

Appeal from an order of Judge Harold P. Burke in the United States District Court for the Western District of

New York summarily dismissing a high school teacher's complaint under 42 U.S.C. §1983, which alleged that school officials violated his constitutional rights by discharging him because he had worn a black armband in class.

Reversed and remanded.

Burt Neuborne, New York, N. Y. (New York Civil Liberties Union, of counsel), for Appellant.

Harry Treinen, Corning, N. Y. for Appellees.

John P. Jehu, Albany, N. Y., for Commissioner of Education of the State of New York, *Amicus Curiae.*

KAUFMAN, Circuit Judge:

The first amendment proscription against any law abridging freedom of expression, perhaps more than any other constitutional guarantee, frequently brings into sharp focus the inexorable tension between enduring concerns for individual freedom and the authority required to preserve the democracy so crucial to realizing that freedom. For several decades, the courts have struggled with principles and concepts necessary to strike a functional balance between protected speech and the government's legitimate interest in protecting our democracy.[1]

The Supreme Court has more than once instructed that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker,* 364 U. S. 479, 487 (1960), quoted in *Keyishian v. Board of Regents,* 385 U. S. 589, 603 (1967); *Tinker v. Des Moines Independent Community School District,* 393 U. S. 503, 512 (1969). Rightly called the "cradle of our democracy," our schools bear the awe-

[1] *See generally,* Kaufman, *The Medium, the Message and the First Amendment,* 45 N.Y.U.L. Rev. 761 (1970). (The James Madison Lecture.)

some responsibility of instilling and fostering early in our nation's youth the basic values which will guide them throughout their lives. Appellant is quick to agree that we cannot tolerate undisciplined, coercive, intimidating or disruptive activities on the part of teachers or students which threaten the essential functions of our schools, and that such conduct requires a disciplinary response. But, the issue in this case is whether, in assuming the role of judge and disciplinarian, a Board of Education may forbid a teacher to express a political opinion, however benign or noncoercive the manner of expression. We are asked to decide whether a Board of Education, without transgressing the first amendment, may discharge an 11th grade English teacher who did no more than wear a black armband in class in symbolic protest against the Vietnam War, although it is agreed that the armband did not disrupt classroom activities, and as far as we know did not have any influence on any students and did not engender protest from any student, teacher or parent. We hold that the Board may not take such action.

The facts essential to a resolution of the conflicting interests are undisputed. On June 7, 1969, Charles James was employed as an 11th grade English teacher at Addison High School, located near Elmira, New York. He previously had taught in the New York City public schools. After moving to the Elmira area, James, a practicing Quaker, joined the Elmira Meeting of the Religious Society of Friends.

When November 14 and December 12, 1969, were designated as "moratorium" days by the opponents of the Vietnam War, the Elmira Meeting determined to observe the two days by wearing black armbands.[2] On November

[2]In a statement signed after James had been dismissed, the members of the Elmira Meeting explained their motivation:

> It is from this religious context [Quaker belief in the futility and immorality of war] that Charles James drew

14 James affixed one of the armbands, which had been prepared by the Meeting, to the sleeve of his jacket. He since has stated that he "resolved to wear one of the black armbands as an expression of [his] religious aversion to war in any form and as a sign of [his] regret over the loss of life in Vietnam."

Shortly after school began that day, Carl Pillard, the Principal, entered James's homeroom, noticed the armband, but made no comment. Pillard waited until midway through the second period when James was teaching poetry, apparently without any incident or discussion whatsoever relating to Vietnam or the armband, to summon James to his office and to request him to remove the armband. When James refused to remove it, Pillard sent him to the District Principal, Edward J. Brown. Brown ordered James to remove the armband or risk suspension or dismissal because the armband constituted a symbolic expression of his political views.[3] In addition, Brown

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(footnote continued):

> his moral imperative to act as he did, in wearing a black armband—symbol of sympathy and mourning for the dead —on those days accepted nationally as the time to demonstrate for peace and for an end to the killing in Vietnam. His action was as one member of this meeting, along with other members, who chose out of the same deep convictions to wear a black armband all and every day of the moratoriums.

[3]Brown apparently assured James that there was no question as to his right to hold political views or to participate in political activities outside of school. Controversial issues, he said, should not be discussed in school unless they are relevant to the subject matter being taught and all points of view are objectively presented. He relied in part on a letter of November 3, 1969, from Herbert F. Johnson, Deputy Commissioner of the Department of Education of New York, which set forth the Department's policies with respect to the upcoming moratorium days: "The school posture should be neutral and objective. Administrators and staff members should avoid taking

feared that "wearing the armband would tend to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations." When James again refused to remove the armband, Brown summarily suspended him and ordered James to leave the school at once.

The following day James received a letter from the Board of Education of Central District No. 1, reinstating him on "the understanding that [he] engage in no political activities while in the school."[4] James resumed his teaching duties, but, steadfastly abiding by his principles, whether religious (Quakers are doctrinally opposed to war) or political in nature, he came to school wearing an armband on December 12, the second moratorium day. He was summarily suspended as soon as Brown learned that James again had worn an armband. Here, too, the record

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(footnote continued):

positions on controversial matters which may reflect on the objectivity of the school." In addition, Brown suggested that it was a breach of professional ethics to use the classroom to promote partisan politics. *See* New York State Teachers Ass'n, Joint Code of Ethics.

[4]The letter in full read:

> The Board of Education of Addison Central School District has conferred with counsel and very thoroughly discussed the facts of your situation. The Board has, unanimously, confirmed the action of District Principal Edward J. Brown regarding your suspension on Friday, November 14, 1969.
>
> The Board deems your action to be a political act. As such, it is prohibited in the School. It is, also, deemed unethical action on the part of a teacher to engage in such activity.
>
> You may return to class on Monday, November 17, 1969, with the understanding that you engage in no political activities while in the School.
>
> Of course, the Board recognizes fully your absolute right to express outside of the School any beliefs that you may have.

is barren of a scintilla of evidence indicating that there were any incidents or threats to school discipline, that any students or teachers had complained of or were offended by James's first or second symbolic protest, or that the armband constituted more than a silent expression of James's own feelings. On January 13, however, without affording James a hearing, the Board of Education of Central District No. 1 discharged him from his teaching position in accordance with §3013(1) of the Education Law of New York.[5]

James appealed his dismissal to the New York State Commissioner of Education, Ewald B. Nyquist, asserting that his dismissal infringed upon his first amendment rights and deprived him of due process of law.[6] The "hearing" before the Commissioner, as we were informed at the argument of this appeal, was no more than an informal round-table discussion between the Commissioner, the parties and their attorneys. No transcript of the proceedings was made. On September 23, 1970, Commissioner Nyquist filed his decision. Although he recognized that a board of education does not have unfettered discretion to dismiss a probationary teacher,[7] he concluded that James had violated "sound educational principles"

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[5]James, in his first year of teaching at Addison, was appointed as a "probationary" teacher. Under the provisions of §3013(1) of the Education Law of New York, the services of a probationary teacher "may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees."

[6]*See* Education Law of New York §310.

[7]Commissioner Nyquist relied on his earlier decision in *Matter of Collins*, Decision No. 8051, August 26, 1969:

> While I fully agree that a board of education has broad powers over a probationary teacher and may dismiss a probationer without giving a reason, the exercise of these powers by a board must be made "within

and that his actions "were not constitutionally protected." In addition, he reaffirmed the Board of Education's absolute right to dismiss a probationary teacher without affording the teacher a hearing or explaining the basis of the discharge.

Thereupon, James instituted this action in the Western District of New York against the Board of Education of Central District No. 1, Edward Brown, Carl Pillard and Robert Andrews, President of the School District Board of Trustees, alleging that his dismissal violated 42 U.S.C. §1983.[8] Judge Burke, in a brief memorandum, denied James's motion for summary judgment and granted the defendants' motion for a judgment, summarily dismissing the complaint on the merits, seemingly on two grounds: first, that the issues raised by the complaint were *res judicata*, and second, that none of James's federally protected rights was violated.[9]

(footnote continued):

> the ambit of the purpose for which they were granted and in a manner consistent with our basic Constitutional framework."

See also Puentes v. Board of Education, 24 N. Y. 2d 996 (1969), *rev'g* 24 A. D. 2d 628 (1966).

[8] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

James's complaint asserts violations of his rights to free speech, free exercise of religion, procedural due process and equal protection of the laws.

[9] In this posture of the proceedings, we must accept all factual allegations in the complaint as true.

I.

At the outset we are presented with the contention that the claims asserted below are *res judicata*. We consider this to be wholly without merit. Appellees argue that James, at his own choosing, was given the full opportunity to litigate his claims before the Commissioner of Education, a "judicial officer" of the State, and therefore that James should be bound by the Commissioner's decision. Judge Burke buttressed their position with a pointed reference to James's failure to appeal the Commissioner's decision to the New York courts.[10]

It is no longer open to dispute that a plaintiff with a claim for relief under the Civil Rights Act, 42 U.S.C. §1983, is not required to exhaust state judicial remedies. See, e. g., *Monroe v. Pape*, 365 U. S. 167 (1961); *Rodriguez v. McGinnis*, —— F. 2d ——, 1971 Slip Op. 1527 (2nd Cir. Jan. 25, 1972) (*en banc*); *Sostre v. McGinnis*, 442 F. 2d 178, 182 (2nd Cir. 1971) (*en banc*), *cert denied*, 404 U. S. 1049 (1972). It is still the law in this Circuit, however, that a Civil Rights plaintiff must exhaust state administrative remedies. *Eisen v. Eastman*, 421 F. 2d 560 (2nd Cir. 1969), *cert. denied*, 400 U. S. 841 (1970). It hardly can be suggested that a plaintiff having followed the course laid out by *Eisen*, was to be barred henceforth from pressing his claim to final judicial review or to be deprived of his opportunity to litigate his constitutional claims in the judicial forum of his choice. To adopt the full implication of appellees' argument would be to effect a judicial repeal of 42 U.S.C. §1983 and strike down the Su-

[10]Although §310 of the Education Law of New York provides that any decision of the Commissioner "shall be final and conclusive, and not subject to question or review in any place or court whatever," New York courts have reviewed decisions where there is a claim that the decision was arbitrary or an abuse of discretion. *See, e.g., Board of Education v. Allen*, 6 N. Y. 2d 127 (1959).

preme Court's decision in *Monroe v. Pape, supra.* James would be placed in the paradoxical position of being barred from the federal courts if he had not exhausted administrative remedies and barred if he had.[11]

II.

We come now to the crucial issue we must decide—did the Board of Education infringe James's first amendment right to freedom of speech?[12]

Any meaningful discussion of a teacher's first amendment right to wear a black armband in a classroom as a symbolic protest against this nation's involvement in the Vietnam War must begin with a close examination of the case which dealt with this question as it applied to a student. *Tinker v. Des Moines Independent Community School District, supra.* Mary Beth Tinker, a junior high school student, her older brother and his friend, both high school students, were suspended from school

[11]Appellees' reliance on Judge Weinstein's opinion in *Taylor v. New York City Transit Authority*, 309 F. Supp. 785 (E.D.N.Y.), *aff'd* 433 F. 2d 665 (2d Cir. 1970), is misplaced. Judge Weinstein's determination that Taylor could not raise his procedural due process claim in the federal courts, after he had appealed his discharge as a Transit Authority employee to the New York City Civil Service Commission and then the New York courts, was based on Taylor's failure to raise that claim before the administrative agency. The decision was nothing more than a logical extension of *Eisen v. Eastman, supra,* through the application of traditional notions of merger and bar. Since no transcript of the proceedings before Commissioner Nyquist was made, James cannot be charged with the failure to raise any of his claims. Suffice it to say that appellees conceded at oral argument that the broad range of James's grievances were discussed informally before the Commissioner.

[12]In view of our decision, it is unnecessary to reach the claims that the discharge violated his rights to free exercise of religion and equal protection of the laws.

for wearing black armbands in school to publicize their opposition to the war in Vietnam. Noting that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U. S. at 506, the Supreme Court held that a school cannot bar or penalize students' exercise of primary first amendment rights akin to "pure speech" without "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

With respect to both teacher and student, the responsibility of school authorities to maintain order and discipline in the schools remains the same. The ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers. Although it is not unreasonable to assume that the views of a teacher occupying a position of authority may carry more influence with a student than would those of students *interesse*, that assumption merely weighs upon the inferences which may be drawn. It does not relieve the school of the necessity to show a reasonable basis for its regulatory policies. As the Court has instructed in discussing the state's power to dismiss a teacher for engaging in conduct ordinarily protected by the first amendment: "The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficency of the public services it performs

through its employees." *Pickering v. Board of Education*, 391 U. S. 563, 568 (1968).[13]

It is to be noted that in this case, the Board of Education has made no showing whatsoever at any stage of the proceedings that Charles James, by wearing a black armband, threatened to disrupt classroom activities or created any disruption in the school. Nor does the record demonstrate any facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities * * *." *Tinker v. Des Moines Independent Community School District*, 393 U. S. at 514. All we can learn from the record is that in the

[13] *Pickering* dealt with the power of the Board of Education to discharge a high school teacher for sending a letter to the local newspaper criticizing the Board and the district superintendent of schools for their fiscal policies. The Board insisted that the letter was disruptive of faculty discipline and would tend to foment "controversy, conflict and dissension" among teachers, administrators and residents of the district. The Court held that the Board had violated the teacher's first amendment rights. Appellees would distinguish *Pickering* by having us draw an arbitrary line between first amendment rights exercised in school and out of school. The distinction is deceptively simple and cannot withstand scrutiny. *See Goldwasser v. Brown*, 417 F. 2d 1169 (D.C. Cir.), *cert. denied*, 397 U. S. 922 (1969) (*Pickering* test applies to teacher's classroom speech at Air Force language school). Appellees concede, as they must, that James has a constitutional right to wear a black armband off school premises—every day if he so pleases. But, it is not unreasonable to assume that James, as a teacher, might gain notoriety for such out-of-school conduct and become a vanguard of the local opposition to the Vietnam War. In that event, one could not divorce his person from the idea, and he would become an embodiment of his symbolic protest no matter where or how he appeared—even if temporarily without his armband. Although we can imagine situations in which a teacher would be so controversial because of his tenets or beliefs that he would be a disruptive force in the school, no one would suggest that he could be dismissed merely because he was *identified* with a particular cause if he did not preach that cause in class.

opinion of Edward Brown, the District Principal, "wearing the armband would tend to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations." "But," the Supreme Court warned in *Tinker*, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[14] *Id.* at 508.

Appellees urge us not to conclude that schools must wait until disruption is on the doorstep before they may take protective action. We do not suggest this course, but if anything is clear from the tortuous development of the first amendment right, freedom of expression demands breathing room. To preserve the "marketplace of ideas" so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement. *Id.* at 508-09; *Terminiello v. Chicago*, 337 U. S. 1 (1949). This is entirely different, however, from saying that the school must await open rebellion, violence or extensive disruption before it acts. *Compare Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966), *with Blackwell v. Issaquena County Board of Education*, 363 F. 2d 749 (5th Cir. 1966).[15]

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[14]The facts here call more clearly for the protection of James's rights than did those in *Tinker*. In his dissenting opinion in *Tinker*, Justice Black emphasized that "[e]ven a casual reading of the record shows that the armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker 'self-conscious' in attending school with his armband." 393 U. S. at 518. The record in this case does not support similar inferences.

[15]In *Burnside v. Byars*, the Fifth Circuit ordered that school authorities be enjoined from enforcing a regulation against wearing freedom buttons when there was no evidence of disruption. The same panel of the Fifth Circuit on the same day in *Issaquena* upheld a similar regulation in another school because students wearing the buttons had attempted to force unwilling students to wear the buttons. When the offending students were ordered to remove their buttons and cease distributing them in school, they engaged in disruptive activities.

III.

That does not end our inquiry, however. The interest of the state in promoting the efficient operation of its schools extends beyond merely securing an orderly classroom. Although the pros and cons of progressive education are debated heatedly, a principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables to transmit the basic values of the community. "[S]ome measure of public regulation is inherent in the very provision of public education." Note, *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1053 (1968). Accordingly, courts consistently have affirmed that curriculum controls belong to the political process and local school authorities. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values." *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968).[11]

Appellees argue that this broad power extends to controlling a teacher's speech in public schools, that "assumptions of the 'free marketplace of ideas' on which freedom of speech rests do not apply to school-aged children, especially in the classroom where the word of the teacher may carry great authority." Note, *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. at 1053. Certainly there must be some restraints because the students are a "captive" group. But to state the proposition without

[11]Even in this area there are constitutional limitations. In *Epperson*, for example, the Court held that a state could not prevent a high school biology teacher from teaching students about Darwin's theory of evolution because the regulation would be an establishment of religion in violation of the first amendment. Nor can a state prevent the teaching of modern foreign languages under the guise of promoting "civic development." *Meyer v. Nebraska*, 262 U. S. 390 (1923).

qualification is to uncover its fallacy. More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students. *Cf. Keyishian v. Board of Regents, supra.*

As we have indicated, there is merit to appellees' argument that *Tinker* does not control this case, because a teacher may have a far more pervasive influence over a student than would one student over another. Although sound discussions of ideas are the beams and buttresses of the first amendment, teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy. When a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism. But, just as clearly, those charged with overseeing the day-to-day interchange between teacher and student must exercise that degree of restraint necessary to protect first amendment rights. The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent "greater than is essential to the furtherance of" those interests. *See United States v. O'Brien*, 391 U. S. 367, 377 (1968). Thus, when a teacher presents a colorable claim that school authorities have infringed on his first amendment rights and arbitrarily transgressed on these transcendent values, school authorities must demonstrate

a reasonable basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum. What we require, then, is only that rules formulated by school officials be reasonably related to the needs of the educational process and that any disciplinary action taken pursuant to those rules have a basis in fact.

Several factors present here compel the conclusion that the Board of Education arbitrarily and unjustifiably discharged James for wearing the black armband.[17] Clearly, there was no attempt by James to proselytize his students.[18] It does not appear from the record that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal views.

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[17]In light of our holding, we find it unnecessary to decide whether the Board of Education violated James's due process rights by not affording him an evidentiary hearing before he was dismissed. *Compare Roth v. Board of Regents*, 446 F. 2d 806 (7th Cir.), *cert. granted*, 404 U. S. 909 (1971), *and Sindermann v. Perry*, 430 F. 2d 939 (5th Cir. 1970), *cert. granted*, 404 U. S. 917 (1971) (a probationary teacher has a right to a hearing when he has a colorable claim that his dismissal violates the first amendment), *with Parker v. Board of Education*, 348 F. 2d 464 (4th Cir. 1965) (a probationary teacher has no constitutional right to a hearing when his contract is not renewed). *See also Drown v. Portsmouth School District*, 435 F. 2d 1182, 1188 (1st Cir. 1970), *cert. denied*, 402 U. S. 972 (1971); *Orr v. Trinter*, 444 F. 2d 128, 135 (6th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3126 (Aug. 18, 1971); *Shirck v. Thomas*, 447 F. 2d 1025, 1026 (7th Cir. 1971), *petition for cert. filed*, 40 U. S.L.W. 3321 (Dec. 3, 1971), 40 U.S.L.W. 3375 (Jan. 21, 1972); *Note*, 85 Harv. L. Rev. 1327 (1972). The Supreme Court has heard argument in both *Roth* and *Sindermann*, and its decision may well be dispositive of this issue.

[18]Appellees argue that James's political activity was unacceptable in the classroom because the armband was "the projection of an idea • • • it asks no comments in return and it invites no discussion." This fact alone cannot condemn a protected medium of expression.

Moreover, we cannot ignore the fact that James was teaching 11th grade (high school) English. His students were approximately 16 or 17 years of age, thus more mature than those junior high school students in *Tinker*.

Recently, this country enfranchised 18-year-olds.[19] It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue. Under the circumstances present here, there was a greater danger that the school, by power of example, would appear to the students to be sanctioning the very "pall of orthodoxy," condemned in *Keyishian*, which chokes freedom of dissent.[20]

Finally, James was first removed from class while he was teaching poetry. There is no suggestion whatsoever that his armband interfered with his teaching functions, or for that matter, that his teaching ever had been deficient in any respect.[21]

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[19]Eighteen-year-olds, in addition, are now eligible to serve on federal juries. Pub. L. No. 92-269 (Apr. 6, 1972).

[20]*See Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970) (violation of first amendment rights to dismiss a junior high school teacher who refused to lead her class in the Salute to the Flag because she believed the phrase "with liberty and justice for all" was an untrue statement).

[21]Appellees rely extensively on *Goldwasser v. Brown*, *supra*, which is clearly inapposite. Goldwasser, a civilian, was employed as a language instructor in the Air Force Language School to teach English to foreign military officers. After repeated warnings against discussing controversial subjects during class hours, he was discharged for antiwar statements and comments about anti-Semitism in America. In upholding the dismissal in the face of a first amendment challenge, the court relied on findings that his conduct interfered with the proper performance of his duties because he unduly sacrificed classroom teaching hours. 417 F. 2d at 1176-77.

IV.

We emphasize that we do not question the broad discretion of local school authorities in setting classroom standards, nor do we question their expertise in evaluating the effects of classroom conduct in light of the special characteristics of the school environment. The federal courts, however, cannot allow unfettered discretion to violate fundamental constitutional rights.[22] Professor Jaffe put it aptly in an analogous area of the federal courts' review power: "* * * expertness is not a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from review." L. Jaffe, Judicial Control of Administrative Action 613 (1965). We cannot abdicate our responsibility to form our own conclusions when, having thoroughly searched the record, we find no sound constitutional basis for the Board's or the Commissioner's conclusions.

The dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression. Indeed, James has alleged in his complaint that another teacher, "without incurring any disciplinary sanction, prominently displayed the slogan 'Peace with Honor' on a bulletin board in his classroom." This slogan

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[22]The Supreme Court decision in *Tinker* instructs that the federal courts must not accept unquestionably the school authorities' judgment as to the effects of classroom conduct or speech. *See*, Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 158 (1969): "By not deferring to the administrative expertise of school officials, *Tinker* imposes new limitations on the power of the state to restrain students from speech or conduct which would clearly be protected by the first amendment if engaged in by adults."

has been associated with our foreign policy. If the allegation is true, and we must assume that it is in light of the summary dismissal of the complaint, it exemplifies the concern we have expressed. The Board's actions under such circumstances would indicate that its regulation against political activity in the classroom may be no more than the fulcrum to censor only that expression with which it disagrees. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 510-511 (petitioners were barred from wearing black armbands but other students were allowed to wear political campaign buttons and the Iron Cross, a traditional symbol of Nazism). By requiring the Board of Education to justify its actions when there is a colorable claim of deprivation of first amendment rights, we establish a prophylactic procedure that automatically tempers abuse of properly vested discretion.

It is characteristic of resolutions of first amendment cases, where the price of freedom of expression is so high and the horizons of conflict between countervailing interests seemingly infinite, that they do not yield simplistic formulas or handy scales for weighing competing values. "The best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts. One must be satisfied with such present solutions and cannot expect a clear view of the terrain beyond the periphery of the immediate case." *Eisner v. Stamford Board of Education*, 440 F. 2d 803, 804 n. 1 (2d Cir. 1971).

It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the Board of Education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools which reasonably may be expected to interfere with the educational process.

Accordingly, we conclude that the district court erred. The judgment of the district court is reversed and the case remanded for proceedings not inconsistent with this opinion.

Opinion of the United States District Court.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CHARLES JAMES,

Plaintiff,

vs.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

Civil 1971-164

Burt Neuborne, Jeremiah S. Gutman, Herman Schwartz and Harrop Freeman, % New York Civil Liberties Union, 84 Fifth Avenue, New York, N. Y. 10011, Attorneys for Plaintiff.

Harry Treinin, 11 East Market Street, Corning, N. Y. 14830, Attorney for Defendants.

Commissioner of Education of New York, *Amicus Curiae*, Robert D. Stone and John P. Jehu, State Education Building, Albany, N. Y. 12224 (of counsel).

The defendants by their written motion filed August 20, 1971, move to dismiss the complaint upon grounds particularly stated therein, and for judgment on the pleadings; and for summary judgment in their favor. The plaintiff filed his affidavit sworn to September 27, 1971 in opposition. The matter came on for argument September 27, 1971. Upon due consideration summary judgment is hereby granted to the defendants as follows: It is hereby

ORDERED, ADJUDGED and DECREED as follows: The plaintiff appealed to the Commissioner of Education of the State of New York from the action of the Board of Education of Central School District No. 1 of the Towns of Addison, Cameron, Rathbone, Tuscarora, Woodhull, Thurston, Erwin, Lindley and Canisteo; Steuben County, relating to his dismissal. The Commissioner of Education by decision and order dated September 29, 1970, dismissed the appeal, holding in conclusion "Since the actions of the appellant were contrary to sound educational principles, and since those actions were not constitutionally protected in the circumstances of this appeal, the action of the respondent in terminating appellant's probationary appointment must be sustained." The plaintiff did not appeal, as he had the right to do, but instead brought this action. The questions raised by the complaint in this action are *res judicata*. The plaintiff in wearing the black arm band in the classroom was effectively presenting only one side of an important political issue. In so doing he chose to ignore the expressed policy of the State Education Department calling for neutrality and objectivity in dealing with "Moratorium Days" on the part of teachers and administrators. These were days of intense political feeling on the question of the policy of the Administration in reference to its conduct of the Viet Nam War. His actions in this respect

amounted to insubordination. His actions were not constitutionally protected. Plaintiff's dismissal did not violate his rights under the First Amendment of the Federal Constitution, nor any of his federally protected rights. He was not entitled to a hearing prior to his dismissal. The complaint is dismissed on the merits.

HAROLD P. BURKE
United States District Judge

December 22, 1971.

Letter, Filed With the Circuit Court on Behalf of Commissioner of Education, State of New York.

June 9, 1972

Hon. Henry J. Friendly
Chief Judge
United States Court of Appeals
United States Court House
Foley Square
New York, New York 10007

Re: James v. Board of Education *et al.*
Docket No. 72-1109
Cal. No. 697

Dear Judge Friendly:

This letter is written on behalf of the New York State Commissioner of Education who has appeared throughout as *amicus curiae* in the above entitled matter.

We urgently support the petition for a rehearing *in banc* which has been or will be filed by the board of education of the Addison Central School District, Steuben County, New York, Appellees.

We strongly feel that the decision of the Court, rendered May 24, 1972, is directly contrary to sound educational principles and will have serious adverse effects on the New York State school system. It is directly contrary to the Code of Ethics adopted jointly by both the New York State School Boards Association and the New York State Teachers Association, and directly contrary to specific directives issued to all school districts by the New York State Education Department.

It is our view that this decision would open the door to political indoctrination in the State's classrooms.

When the Court says:

> "There is no suggestion whatever that his [James'] armband interfered with his teaching functions * * *."

and

> "It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the board of education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools *which reasonably may be expected to interfere with the educational process.*" (Italics supplied.)

it is clear that the Court misapprehended the nature of the educational process. It is exactly the act of (1) teaching only one of several views of a highly controversial subject and (2) teaching in a field in which he has no demonstrated competence which does, in and of itself, interfere with the educational process, which is the heart of the problem here.

We are deeply disturbed by the holding throughout the decision that only "disruption" and "incidents or threats to school discipline" can be a proper basis for action by a board of education. It is the teaching function itself with which we are concerned rather than any question of discipline or possible disruption. It is submitted that such an approach would divest boards of education of control over the very core of their functions.

We are, further greatly disturbed over the Courts sanctioning a procedure where a State *judicial* tribunal (see New York Education Law sections 310, 207) renders a judicial decision, based on the filing and service of pleadings, memoranda of law and an oral argument

(characterized inaccurately by the Court "as we were informed at the argument of this appeal" as "no more than an informal round-table discussion between the Commissioner, the parties and their attorneys"), and the same petitioner, represented by the same counsel ignoring such procedure and decision, proceeds *de novo* in the Federal Court. It is submitted that from the standpoint of proper Federal judicial procedure and jurisdiction, such a decision may not be collaterally attacked in such fashion. Either the petitioner should seek to review the Commissioner's decision in the State Courts and then appeal from them to the United States Supreme Court; or the petitioner should seek review of the decision directly in the Federal Courts. In either case the record, on the basis of which the Commissioner's decision was rendered, would be before the Court. To sanction such an improper approach to the judicial function would have a chilling effect on any use of any State procedures, and ignores the fundamental principle of *res judicata*.

We are, finally, greatly disturbed by the repeated references by the Court to wholly nonexistent facts for which there is no basis whatever in the record. The Court says:

> "We cannot countenance school authorities arbitrarily censoring a teacher's speech *merely because they do not agree with the teacher's political philosophies or learnings.*"

There is not one scintilla of evidence in the record to support such a statement. In fact, it is our understanding that both the board of education and the administration are divided on these issues, and it is for this very reason—to be sure that the students will not be proselytized one way *or the other* but will be given the whole picture, with all sides explained in the class and

at the time when the subject is properly reached for discussion—that strict neutrality was and is required of teachers by the board of education.

When the Court says:

> "Clearly, there was no attempt by James to proselytize his students,"

we can only ask for what other reason he could possibly have worn the armband *to class?*

It can hardly be maintained that limiting an English class to the teaching of English or a mathematics class to the teaching of mathematics, imposes a "pall of orthodoxy" on the students.

Nor can such a "pall of orthodoxy" be found where a school insists that students be *acquainted with all sides* of a given subject, and only by the teacher charged with, prepared for, and expert in, the subject involved, whatever it may be.

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." (*West Virginia v. Barnette*, 319 U. S. 624, 637.)

We think the Court went far afield indeed when it said:

> "* * * as far as we know [James' armband] *did not have any influence on any students* and did not engender protests from any student, teacher or parent." (Italics supplied.)

For one thing the record is wholly devoid of evidence on this question, and, more importantly, since students are told to look up to, emulate, and be guided by their teachers, the influence of such expressions of political views of teachers on students is almost impossible to gauge especially within the confines of a lawsuit. This

is particularly true where no opportunity for discussion exists—the subject of the teacher lying in other fields.

For all the foregoing reasons, *amicus curiae* respectfully supports the motion of appellees for a rehearing *en banc*.

Respectfully,

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-564

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

—v.—

CHARLES JAMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1972

No. 72-564

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

—v.—

CHARLES JAMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Western District of New York (Burke, J.) summarily dismissing respondent's complaint has not been officially reported. It is reproduced in the Appendix to the Petition

herein at pp. 40-42. The opinion of the Court of Appeals for the Second Circuit reversing the summary dismissal of respondent's complaint and remanding the case for further proceedings is reported at 461 F.2d 566 and is reproduced in the Appendix to the Petition herein at pp. 21-39. The preliminary injunction granted by the District Court on remand from the Second Circuit has not been officially reported. It is reproduced as an Appendix to this Brief in Opposition at pp. 5a-7a.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1) May petitioners summarily dismiss respondent, a high school English teacher, solely because, as a Quaker, he wore a black armband to class as an expression of his anguish over the loss of life in Vietnam, in the absence of any showing that respondent, by wearing the armband, threatened to disrupt classroom activities or in any way interfered with his teaching responsibilities?

2) Was respondent entitled to a hearing prior to his dismissal for engaging in colorably protected First Amendment activity?

3) Was respondent denied the equal protection of the laws in being dismissed while other teachers in the school in question engaged in substantially similar conduct supportive of the Vietnam war without incurring disciplinary sanctions?

4) Was the determination of the Second Circuit remanding this action to the District Court for further proceedings a final disposition herein rendering this case ripe for review by this Court?

Statement of the Case

On June 7, 1969, respondent, Charles James, was engaged as an 11th grade English teacher at Addison High School. Apart from the "black armband incident" which forms the basis of this action, no question concerning James' competence or teaching ability has been raised [A. 5a; 46a].*

James, who had moved to the Elmira area after teaching in the New York City Public Schools, is a practicing Quaker and, shortly after arriving in the Elmira community, joined the Elmira Meeting of the Society of Friends (Quakers).[1] During the Autumn of 1969, the Elmira Meeting expressed concern over the massive loss of life in Vietnam. When two dates in the Autumn of 1969 were designated as "moratorium" days by opponents of the Vietnam War, the Elmira Meeting convened to discuss how best to observe the moratorium days in the context of the traditional Quaker aversion to participation in war in any form. After discussion, the Meeting agreed to prepare and to wear black armbands

* Citations to the Appendix herein lodged with the Second Circuit are denoted as [A. —].

[1] James' deep religious convictions are of long standing. He had studied for the Methodist Pastorate at Mansfield State College and Colgate-Rochester Divinity School, had served as a Methodist Minister from 1955-1963 and had served on the World Peace Commission of the Methodist Church in 1956. James' strong pacifist beliefs led him to become a Quaker in the mid 1960's. James had volunteered for service in the Korean War in 1950 as a Chaplain's Assistant [A. 47a].

on moratorium days as a sign of mourning for all those killed in the Vietnam War and as an expression of deep conviction that the existence of war was incompatible with their religious faith. Accordingly, the members of the Meeting prepared black armbands at the Quaker Meeting House and distributed them to members of the Meeting.[2]

On November 14, 1969, prior to reporting to school, Charles James affixed one of the black armbands which had been prepared for the occasion to the sleeve of his jacket. In James' own words:

> "I was held by the awareness that after at least 25 centuries of civilization men found within their lives the will to deliberately, and when possible, carefully, kill each other. And often this occurred while looking upon one another so as to behold death and dying willingly.
>
> "I considered wearing my armband—considered its value and considered the possible glares and frowns from colleagues. I decided for wearing it as my mind once again staggered at man's willful killing of man. I could not responsibly leave that armband behind and go through *just another day.* If that armband could trigger someone to consider that some people do believe in the preciousness of life and dare to say so then our world would have a better chance of survival. Our Quaker meeting had made it for this purpose; the rest was up to me. Those years of letter writing, preaching, speaking, arguing and marching

[2] A joint statement describing the basis for the Elmira Meeting's preparation of black armbands as an expression of religious aversion to war has been subscribed to by each member of the Meeting, was submitted to the Court below [A. 52a-56a] and is reproduced in the Appendix to this Brief in Opposition at pp. 1a-4a.

would be rendered hollow if I didn't wear it." Brief of Appellant, p. 3.

Shortly after the opening of school on November 14, 1969, the Principal of Addison High School, Carl Pillard, entered James' home room and noticed his black armband, but made no comment. Midway through the school's second period, Pillard summoned James and requested him to remove his armband. When James refused, Pillard directed him to discuss the matter with Edward J. Brown, the District Principal. Brown ordered James to remove his armband or risk suspension and firing because Brown believed that James' wearing the armband constituted a symbolic expression of his political views. In addition, Brown feared that "wearing the armband would *tend* to be disruptive and would *possibly* encourage pupils to engage in disruptive demonstrations." Affidavit of Edward J. Brown, par. 7 (emphasis added) [A. 21a-24a].

When James explained that as a matter of conscience and religious scruple he could not remove the armband, Brown suspended him and ordered him to leave school immediately. James complied with Brown's directives and went directly to the Quaker Meeting House in Elmira where he participated in a prayer vigil seeking an end to war in any form [A. 50a].

On November 15, 1969, James received a communication from Central Board No. 1 confirming Brown's right to suspend him, but reinstating him provided that he engage in no "political" activity while in school [A. 33a]. Since the incident which had precipitated James' suspension had been overwhelmingly motivated by religious conscience, James returned to school on November 17 hopeful that the

entire incident was closed. He taught without further incident until December 12, 1969 [A. 50a].

On December 12, 1969, in conjunction with a second national "moratorium" day, the Elmira Meeting once again prepared black armbands as a sign of mourning for all those killed in war and as an expression of their religious aversion to war in any form. James, viewing the armbands as the expression of a deeply sensed religious conscience, felt compelled, once again, to wear a black armband on December 12 [A. 7a; 50a-51a].

Upon learning that James had appeared at Addison High School wearing a black armband, Brown summarily suspended him from his teaching duties. James was, thereupon, fired by Central Board No. 1 on January 13, 1970, without a hearing, solely as the result of having worn a black armband to school [A. 51a].

At no time was it even alleged that James' armband had either caused or created a reasonable apprehension of interference with the normal operation of Addison High School. Indeed, Brown's expressed fear that James' armband would *tend* to be disruptive and would *possibly* encourage disruption is a classic example of the "undifferentiated fears" which this Court explictly held could not justify the suppression of First Amendment activity by school officials. *Tinker* v. *Des Moines*, 393 U.S. 503 (1969).

Moreover, at no time has any person accused James of proselytizing his views or in any way attempting to impose his religious or political views upon his students, other than by wearing an unadorned black armband on his sleeve.[3]

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[3] As Judge Kaufman stated below: "Clearly, there was no attempt by James to proselytize his students. It does not appear from the

Subsequent to his dismissal, James appealed to the New York State Commissioner of Education for reinstatement. Commissioner Nyquist sustained petitioners' action, relying upon *O'Connor* v. *Hendrick*, 184 N.Y. 421 (1906) [A. 25a-32a].

After thus exhausting his state administrative remedies, James commenced this action pursuant to Title 42 U.S.C. §1983 to challenge the constitutionality of his dismissal.[a]

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record that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal views." 461 F.2d at 574.

[a] The Commissioner of Education, *amicus curiae*, suggests that James should have utilized an unspecified alternative appeal procedure in seeking Federal judicial review of his dismissal. Apparently unfamiliar with Federal procedure, *amicus* overlooks the fact that an action pursuant to Title 42 U.S.C. §1983 and Title 28 U.S.C. 1343(3) was the most appropriate, and perhaps the sole, vehicle for James to utilize in seeking Federal judicial review of his dismissal. Moreover, *amicus* overlooks the fact that the Second Circuit has instructed civil rights litigants to exhaust administrative remedies—such as appeals to the Commissioner of Education—prior to seeking judicial review in a Federal court. *Eisen* v. *Eastman*, 421 F.2d 560 (2nd Cir. 1969). Having scrupulously observed the course laid out by *Eisen*, respondent can hardly be said to have failed to follow appropriate procedure in seeking Federal judicial review of his dismissal.

At best, the Commissioner's procedural objection appears to be that he should have been named as a party defendant in James' federal complaint—hardly grounds for the application of the *res judicata* doctrine or the summary dismissal of respondent's complaint. While the Commissioner might be a permissible party below, he is certainly not an indispensable one. After all, the Commissioner neither dismissed James nor ordered him dismissed. The Commissioner is not liable for the payment of James' salary. He simply declined an administrative appeal to reverse petitioners' decision. In any event, *amicus* had full notice of the action below and, indeed, appeared vigorously in both lower courts as *amicus curiae* in support of the petitioners.

Moreover, should the Commissioner wish to do so, he may move to intervene as a party at the District Court level and participate fully in any future trial.

(continued on following page)

The District Court summarily dismissed James' complaint on the ground that James' unsuccessful administrative appeal to the Commissioner of Education was a *res judicata* bar to any attempt to secure judicial review under Title 42 U.S.C. §1983. In addition, Judge Burke summarily dismissed respondent's contentions that his rights under the First and Fourteenth Amendments had been violated by his dismissal.

The Court of Appeals for the Second Circuit unanimously reversed the summary dismissal of respondent's complaint and remanded to the District Court for further proceedings not inconsistent with its opinion. On August 11, 1972, the District Court issued a preliminary injunction ordering petitioners to reinstate James as a teacher of English at Addison High School for the 1972-1973 school year pending the final disposition of this action. (The text of Judge Curtin's preliminary injunction is reproduced as an Appendix to this Brief in Opposition at pp. 5a-7a.) Petitioners have neither appealed from the grant of preliminary injunctive relief nor sought a plenary trial on the merits.

Shortly after the issuance of the preliminary injunction by Judge Curtin, petitioners reinstated James, but assigned

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Finally, the assertion of the Commissioner that the Second Circuit was unaware of the record before the Commissioner in James' administrative appeal is, simply, false. The printed Appendix lodged with the Second Circuit below contained both James' petition to the Commissioner, as well as the Commissioner's adverse decision. The Court below recited the undisputed fact that no transcript of proceedings before the Commissioner is kept and specifically noted that:

> "[petitioners] conceded at oral argument that the broad range of James' grievances were discussed informally before the Commissioner." 461 F.2d at 571, n. 11.

him a "teaching" program consisting of six study halls and a lunch period.[4]

James has performed his duties without incident since the opening of school.

ARGUMENT

I.

The decision below is clearly correct.

A. *Respondent's Dismissal Violated His First Amendment Right of Free Speech*

Judge Kaufman, in his decision below for a unanimous panel of the Second Circuit, merely applied settled law that public school teachers and students are entitled to basic First Amendment rights in the absence of a showing that a given expression of opinion would create a concrete danger of dislocation of the educational process. E.g., *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); Compare *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966), with *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966); *Hanover* v. *Northrup*, 325 F. Supp. 170 (D. Conn. 1970); *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

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[4] After vigorous protests that petitioners' action in assigning James to six study halls violated both the letter and the spirit of Judge Curtin's preliminary injunction, petitioners have modified his "teaching" schedule to consist of four study halls and two elective courses involving a total of ten high school seniors.

In light of *Pickering*, petitioners concede that James was constitutionally entitled to identify himself openly with potentially controversial opinions. Given such a concession, petitioner's attempt to distinguish Pickering's open letter from James' black armband is singularly unpersuasive. James' black armband did nothing more than publicly announce his identification with a given religious (Quaker) attitude toward war in general—and toward the war in Vietnam in particular. Since James' armband contained no elements of coercion or intimidation, and in no way interfered with the orderly teaching of his 11th grade English class, the effect of his armband was no different than if he had written a letter to the school or local newspaper vigorously expressing his aversion to war. Cf. *Montgomery* v. *White*, 320 F. Supp. 303 (E.D. Tex. 1969). Thus, in the absence of a showing, or even an allegation, that James' armband interfered with his teaching activities or exercised any coercive or intimidating effect upon his students, petitioners may no more fire Charles James than they could have fired Pickering for writing an open letter on the Vietnam War.[5]

Petitioners have attempted to justify James' dismissal by arguing that "wearing the armband would *tend* to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations." Affidavit of Edward J.

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[5] Petitioners' reliance upon *Goldwasser* v. *Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1969), is similarly misplaced. In *Goldwasser* a civilian employed by the Army to teach English to foreign officers attending the Army War College persisted in utilizing classroom time to discuss the propriety of American military policy. Since his criticism, by using class time, substantially impaired his ability to carry out his teaching assignments, he was dismissed. However, no one has even alleged that James' expression in any way interfered with his teaching responsibilities.

Brown, par. 7 (emphasis added) [A. 22a]. However, such speculative—and unreasonable—fears cannot found the basis for the suppression of First Amendment activity in the context of a public school. E.g., *Tinker* v. *Des Moines, supra.*

The state does, of course, possess a substantial interest in assuring that teachers do not coerce or intimidate students. However, such an interest may be protected without depriving teachers of the ability to express themselves in a non-coercive and non-intimidating manner. Thus, were James alleged to have expressed his aversion to the killing in Vietnam in a coercive or intimidating manner, petitioners would have been perfectly justified in conducting a hearing and, if persuaded of the charges, imposing appropriate sanctions. However, no one has accused James of coercion or intimidation. No student has even suggested that he or she felt intimidated by James' armband. In the absence of such intimidation or coercion, the state lacks a legitimate interest in curbing James' expression.[6]

Thus, the issue is not whether a teacher's coercive, intimidating or disruptive expressions must be tolerated. Of course, such conduct may—and should—be met with firm disciplinary response. Rather, the issue is whether, in the guise of protecting children from intimidation or coercion, the state may forbid a teacher to express an opinion in a

[6] Commissioner Nyquist's position upholding James' dismissal appears to assume that any expression of opinion by a teacher to a student on political issues would have an inherently coercive impact. However, a function of the public schools is to educate citizens for active participation in a democracy. So long as it is non-coercive, a teacher's healthy exchange of ideas and opinions with students can only benefit the democratic process. See, 461 F.2d at 574.

non-coercive manner. Since, the Court below explicitly noted that "the record is barren of a scintilla of evidence indicating that there were any incidents or threats to school discipline, that any students or teachers had complained of or were offended by James' first or second protest, or that the armband constituted more than a silent expression of James' own feelings." 461 F.2d at 569, it is clear that James' actions were protected by the First Amendment.

B. *Respondent's Dismissal Violated His First Amendment Right to the Free Exercise of His Religion*

Although petitioners perceived the "black armband" incident as the expression of a "political" opinion, James was motivated primarily by traditional religious impulses in deciding to affix the armband to his sleeve.[7]

The armbands were prepared at the Quaker Meeting House by members of the Elmira Meeting of the Society of Friends. As a member of the Elmira Meeting, James joined his co-religionists in expressing the traditional Quaker aversion to war in any form by affixing the armband to his sleeve. See, Joint Statement of the Elmira Meeting [A. 52a-56a] reproduced in the Appendix to this Brief at pp. 1a-4a.

In denying James' appeal, Commissioner Nyquist relied upon what he considered to be settled New York law forbidding public school teachers from wearing religious habits in the classroom. *O'Connor* v. *Hendrick,* 184 N.Y. 421 (1906). Respondent believes that whatever the validity

[7] Since the Court below ruled that James' dismissal infringed upon his freedom of speech, it refrained from considering James' claims that the discharge violated his rights to free exercise of religion, equal protection of the laws and procedural due process of law. 461 F.2d at 571 n. 12; 574 n. 17.

of New York's ban upon the wearing of religious habits by nuns employed as public school teachers, the ban on religious garb in the classroom may not constitutionally be extended to prohibit the wearing of non-obtrusive religious symbols, such as respondent's Quaker armband.

The "religious freedom" cases decided by this Court have consistently held that before a state can infringe upon the free exercise of religion, it must demonstrate a compelling state interest which cannot be accommodated by less drastic means. E.g. *Wisconsin* v. *Yoder*, —— U.S. ——, 32 L. Ed.2d 15 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963), vacated and remanded, 375 U.S. 14 (1963), on remand 125 N.W.2d 588 (1963).

What compelling state interest justified the dismissal of Charles James in punishment for having exercised his religious conscience?

Certainly not petitioners' vague and undifferentiated fears of possible future disruption, since no disruption could have been reasonably foreseen.

Certainly not petitioners' commendable desire to shield high school students from indoctrination at the hands of their teachers, since it is conceded that apart from wearing his armband, James made no attempt to foist his religious or political views upon students. Nor can one contend that a compelling state interest exists in obliterating the religion of a teacher from a student's consciousness. As Mr. Justice Douglas noted in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), we are a religious people and it can advance no compelling, or even rational, state interest to

require our public school teachers to masquerade as religiously neuter.

Intimidation or indoctrination cannot be tolerated; but in protecting against such evils it is not necessary to deprive teachers of the ability to express their religious consciences in a non-coercive, non-intimidating manner. The state interest which petitioners' dismissal of James purported to serve may be advanced by less drastic means without infringing upon his religious freedom.

C. *Respondent's Dismissal Violated His Fourteenth Amendment Right to the Equal Protection of the Laws*

It is common practice at Addison High School, as it is in schools throughout the country, for teachers to wear religious emblems and medallions [A. 8a-9a]. Respondent is, of course, not offended by such displays of piety. He is offended, however, at having been singled out for punishment because his religious emblem incurred the displeasure of his superiors.

Moreover, at least one teacher at Addison High School has openly displayed the slogan "Peace With Honor" on his classroom bulletin board without incurring any disciplinary sanctions whatever [A. 9a]. Once again, respondent is not offended by this innocuous expression of support for the Nation's policies in Vietnam. He is offended, however, because his equally innocuous expression of grief over the loss of life in Vietnam was greeted with summary dismissal.

The essence of equal protection is the refusal to tolerate the discriminatory application of the law. Yet, petitioners appear to have adopted a discriminatory dual standard at

Addison High School which tolerates expression only if it is not offensive to the petitioners.

D. *Respondent's Dismissal Violated His Fourteenth Amendment Right to Procedural Due Process of Law*

Respondent was dismissed on January 13, 1970, midway through his one year contract, without any hearing whatever. He was, therefore, never afforded an opportunity to explain to the school board which fired him why he felt compelled to wear mourning for the dead in Vietnam. Nor was he afforded an opportunity to establish that his wearing a black armband had neither disturbed the normal operation of Addison High School nor exerted any coercive or intimidating impact upon his students.

In effect, the procedure utilized by petitioners in firing James without a hearing deprived the school board of any opportunity to render a reasoned decision based upon a study of what actually occurred. Since the critical element in cases such as *Tinker, Pickering* and *James* is the existence or non-existence of concrete factual matter justifying a reasonable apprehension of disruption of the educational process, the school board's ostrich-like refusal to explore the facts surrounding James' dismissal utterly disabled the board from performing its constitutional responsibility.

In *Board of Regents* v. *Roth,* —— U.S. ——, 33 L. Ed. 548 (1972), this Court recognized that if the dismissal of a public school teacher impinged upon his "property" or his "liberty," he was entitled to a due process hearing prior to dismissal.

Since James was dismissed during the term of his teaching contract, the "property" test enunciated in *Roth* is clearly satisfied.

Moreover, since James was concededly dismissed for engaging in colorably protected First Amendment activity, his dismissal impinged upon his "liberty" as well, thus necessitating a due process hearing prior to dismissal. *Board of Regents* v. *Roth*, —— U.S. ——, 33 L. Ed.2d 548 (1972) at 558.

II.

This Court should decline to review a non-final judgment of the Second Circuit.

Petitioners have consistently asserted that the decision of the court below is merely a preliminary determination pending a plenary trial on the merits in the District Court. Accordingly, petitioners refused to reinstate James based upon the decision below and have announced their intention to proceed to trial at some undefined date in the future. Since petitioners view the decision below as a non-final judgment, their request for review by this Court at this stage of the proceedings is premature.

Although 28 U.S.C. §1254(1) vests this Court with power to review non-final judgments issued by Courts of Appeal, such power is exercised only under extraordinary circumstances. See generally, Stern and Gressman, *Supreme Court Practice*, Sec. 4.19. If and when petitioners choose to proceed to trial, or, if and when petitioners concede that no further issues of fact exist which would necessitate a plenary trial, they will be afforded ample opportunity to seek review in this Court. However, in their present posture, petitioners seek merely to review the interlocutory determination of the Second Circuit that the grant of sum-

mary judgment for the defendants in the District Court was erroneous.

Thus, in effect, petitioners seek to appeal to this Court from the denial of their motion for summary judgment. Decades of experience have instructed appeals courts at all levels that the toleration of such interlocutory sorties dramatically burdens appellate dockets, without providing any increase in judicial efficiency or economy. Thus, petitioners' attempt to secure review of a non-final judgment remanding the case for trial should be denied.

CONCLUSION

Petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Joint Statement Describing Basis for Preparation of Black Armbands

The Elmira Meeting of the Religious Society of Friends

Charles and Neva James are members of the Elmira Meeting of the Religious Society of Friends. Having come to us from the Flushing Meeting, they have regularly attended and supported the Elmira Meeting and are held in high esteem and affection by every Friend in our Society.

Our meeting worked with the Elmira Committee for Peace, which was composed of local church representatives—Methodist, Baptist, Greek Orthodox, Roman Catholic, and Unitarian—to formulate plans for observing the 1969 moratoriums. Activities rising from these plans provided the means for Charles James and many others to wear a black armband.

The Religious Society of Friends, known also as Quakers, has concerned itself since its founding with the futility and immorality of war. At the time of the restoration of the English King Charles II in 1660, a "Declaration from the Harmless and Innocent People of God, called Quakers" reads:

> We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretence whatever; this is our testimony to the whole world. The spirit of Christ by which we are guided is not changeable, so as once to command us from a thing as evil and again to move unto it; and we certainly know and testify to the world, that the

> spirit of Christ, which leads us into all Truth, will never move us to fight and war against any man with outward weapons, neither for the kingdom of Christ nor for the kingdoms of this world.[1]

This conviction is based on our essential belief that there is that of God in every man, which has led us not only away from war but into a genuine feeling of equality and brotherhood with all men everywhere.

> Since the working of the Inward Light led men into Truth by unusual ways, it was recognised by the Quaker that toleration of opinions other than those generally held was necessary if the spirit was not to be hindered. To be free to speak and act in accordance with the law of God was an essential of Christian progress. No law of the church or state was considered greater than this law.
>
> Perhaps the greatest contribution the Quaker made was his unflinching constancy in resisting the incursions of the state into the realm of conscience. When disobedience to the law was inevitable he stood his ground without evasion, resisting never with physical violence but with the power of rightiousness and the full force of his religious conviction.
>
> . . . This Inward Light, this something of God in every man, was the center of Quakerism, the mainspring of action behind all the Testimonies, inspiring man's life and giving him faith and courage to withstand persecution.[2]

---

[1] *The Quaker Story* by Sidney Lucas, Harper Bros., pg. 60.

[2] *Ibid.*, pgs. 62-63.

It still is today. A relevant quote from *Faith and Practice*, the Book of Discipline of the New York Yearly Meeting, adopted July 27, 1968, reads:

> No clear line can be drawn between "religious" and "secular" affairs. The service of God is found *in* the world. Accordingly, the Society of Friends has a deep concern for the welfare of the whole community and for every sector of it. Where there is tension, injustice, or conflict—between individuals, groups, or nations—Friends are called to carry on a ministry of reconciliation. This involves an intelligent caring for the dignity and welfare of all persons, and a love for the enemy and the unlovely, not merely for those who love us. This further involves a special caring for those whom the world neglects or exploits or condemns.[3]

It is from this religious context that Charles James drew his moral imperative to act as he did, in wearing a black armband—symbol of sympathy and mourning for the dead —on those days accepted nationally as the time to demonstrate for peace and for an end to the killing in Vietnam. His action was as one member of this meeting, along with other members who chose out of the same deep convictions, to wear a black armband all and every day of the moratoriums. Some of our members also joined in the Washington peace march or joined other members of the Elmira community in keeping a peace vigil in Wisner Park, or held our meeting house open for any one who wanted to come in and discuss the disturbing and divisive issues of the Vietnam War. The armband Charles James

[3] *Faith and Practice*, The Book of Discipline of the New York Yearly Meeting of the Religious Society of Friends, 15 Rutherford Place, New York, N.Y., pg. 34.

wore was one of many made at our meeting house and worn by our members into every walk of life we represent.

Some schools took advantage of this history-in-the-making event by discussing with their students the issues involved and the dynamics of the democratic process taking place in this dissent and peaceable demonstration. That the Addison school missed this opportunity was cause for regret. But their subsequent firing of a teacher for exercising his right silently to stand for what he believes shocked us into the realization that our fundamental liberties, even though protected by the bill of rights, still need our vigilance to keep them alive.

We are proud of the courage and integrity shown by this gentle man among us, and of his wife and children who have suffered along with him. We stand with them all the way, even as another teacher in our midst sewed his armband to his sleeve and still wears it in protest against the persecution of his fellow teacher. But to our knowledge no other school or school board chose to suppress this expression of sympathy and mourning used by many teachers and others throughout the state and nation, most of whom were not Quakers but who believed in and acted on their right to stand, even in silence, and be counted.

We are deeply sorry that Charles James and his family have had to endure for all of us the deprivations, animosities, and suffering that should either have been none of ours or all of ours to share, since we acted similarly, based on the same religious convictions.

We present this Testimony of our full support of the actions of Charles James in wearing to school and in his classrooms a black armband; and we protest the intolerance which has been practiced against him in direct contradiction of his protections under the law of this good land.

Preliminary Injunction Granted by the District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1971-164

CHARLES JAMES,

Plaintiff,

—VS.—

THE BOARD OF EDUCATION OF CENTRAL DISTRICT No. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

APPEARANCES:

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For the Defendants.

Relying upon the mandate of the Court of Appeals in Docket No. 72-1109 (May 24, 1972), the plaintiff moves for an order directing the defendants to reinstate the plaintiff as a teacher at Addison High School for the 1972-1973 school year forthwith pending the final disposition of this matter.

This case was originally heard before Judge Harold P. Burke. The instant motion is brought before me because Judge Burke is away during the month of August and the plaintiff contends that, unless he is reinstated in time for the school year commencing in September, he will not be reinstated for yet another year. It should be noted that the plaintiff has been unable to find regular employment in the Elmira area as a teacher since the defendants terminated his employment on January 13, 1970.

The defendants oppose the motion and have filed affidavits supporting their opposition. They contend that, if the plaintiff is reinstated, another teacher will lose her job and that the educational process would be disrupted if the plaintiff is reinstated and then terminated upon the action being determined against him.

Although counsel for the defendants argues that issues of fact remain, he was unable to specify at oral argument what those issues are. None of the affidavits before Judge Burke reveals any disputed factual issues. Both sides moved for summary judgment before Judge Burke, who granted summary judgment in favor of the defendants. As stated by the Court of Appeals, "[t]he facts essential to a resolution of the conflicting interests are undisputed." Slip opinion at 3229. In addition, "the record is barren of a scintilla of evidence indicating that there were any incidents or threats to school discipline, that any students or teachers complained of or were offended by James's first

or second protest, or that the armband constituted more than a silent expression of James's own feeling." *Id.* at 3242.

The court considers the plaintiff's motion as an application for preliminary injunctive relief. Because the facts discussed above disclose "probable success on the merits and some irreparable injury," *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 20 (2d Cir. 1971), such relief is appropriate.

It is therefore hereby ordered that the defendants reinstate the plaintiff as a teacher of English at Addison High School for the 1972-1973 school year forthwith pending the final disposition of this action.

The court will not entertain an application for a stay of this order.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: August 11, 1972

COPY

IN THE

Supreme Court of the United States

FILED
NOV 4 1972
MICHAEL RODAK, JR., CLERK

No. 72-564

October Term, 1972

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1, CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *AMICUS CURIAE*

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BATAVIA TIMES, LAW PRINTERS,
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IN THE

Supreme Court of the United States

No. 72-564

October Term, 1972

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1, CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *AMICUS CURIAE*

Statement

This Brief *Amicus Curiae* is submitted by Ewald B. Nyquist, as Commissioner of Education of the State of New York, President of the University of the State of

New York, and Chief Executive Officer of the New York State Board of Regents, with the consent of all parties to this litigation (letters of consent* are attached hereto as Appendices A and B).

Respondent Charles James, a teacher of English in the Addison Central High School, was dismissed by petitioner Board of Education on January 13, 1970.

At that point James had a choice of instituting an action in the Federal Courts, or an action or proceeding in the State Courts, or an appeal to the Commissioner of Education of the State of New York who, under New York State law, has judicial powers over the State school system (the procedure on such appeals is described under "Interest of the *Amicus Curiae*", *infra*).

Respondent selected the appeal to the Commissioner of Education as his remedy.

The decision on that appeal was rendered on September 23, 1970. The appeal was dismissed in a lengthy decision, a copy of which is attached hereto as Appendix 2.

At this point respondent again had a choice of three remedies. He could either have petitioned the Commissioner of Education for a re-opening of the decision or he could have sought a review of the decision in the Federal Courts or he could have sought a review of the decision in the State Courts.

Instead of seeking a *review of the decision* in the Federal or State Courts, which he had every right to do, respondent chose to wholly ignore the decision of the forum of his own choice and proceeded *de novo*, by instituting the present action in the United States District Court for the Western

* The originals are on file with the Clerk of the Court.

District of New York. The Commissioner of Education was not named as a party defendant and did not intervene as such.

The complaint was dismissed on December 22, 1971 by Judge BURKE who held that since James did not appeal the decision of the Commissioner, the questions raised had became *res judicata*. Judge BURKE also held that appellee's actions were not constitutionally protected. On appeal to the United States Court of Appeals for the Second Circuit, Judge BURKE's order and judgment was reversed on May 24, 1972 in a unanimous opinion by Judge KAUFMAN. The Court wholly misapprehended the holding of the District Court and the position of the petitioners and *Amicus* as being to the effect that respondent should have exhausted *State* judicial remedies. Neither the District Court nor petitioners nor *Amicus* held or hold such an untenable view. The point is that respondent *should have appealed* the decision of the Commissioner *to the Federal Court*. He could, of course, also have used the lengthier State Court route by asking a State Court to review the decision. But the decision of Judge BURKE was based on lack of appeal to *any Court*.

The Circuit Court opinion was also based on the wholly unsupported and unsupportable assumption of the Court that the Board of Education's action was based on "prejudices of the community" and "because [the Board of Education] do not agree with the teacher's political philosophies and leanings". There is not one scintilla of evidence in the record before the Commissioner to that effect. Indeed, it was exactly the fact of divergent views in the community that underscored the educational policy that teachers must present all points of view.

Petitioners thereafter petitioned for a rehearing, suggesting a rehearing *en banc*. This petition was denied on July 12, 1972, *with Judges Hays and Mulligan dissenting.* A letter on behalf of *Amicus*, supporting the petition for rehearing, is attached hereto as Appendix 3. The order of Chief Judge FRIENDLY, denying said petition for a rehearing, is attached hereto as Appendix 4.

The petition for certiorari is clearly supported by Rule 19 of the Rules of this Court, in that the decision has, procedurally, "so far departed from the accepted and usual course of judicial proceedings. . . .as to call for an exercise of this Court's power of supervision". In addition, even though the merits of the controversy cannot be reached for adjudication, the Court below "has decided a federal question in a way in conflict with applicable decisions of this court".

Interest of the *Amicus Curiae*

The Commissioner of Education of the State of New York, who is a constitutional officer (New York State Constitution, Article V, section 4), has judicial powers over the State education system by virtue of the provisions of New York State Education Law section 310—312, which read as follows:

> "§ 310. Appeals or petitions to commissioner of education and other proceedings. Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

"§ 311. Powers of commissioner upon appeals or petitions, *et cetera*. The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision."

"§ 312. Filed papers and copies thereof. The commissioner shall file, arrange in the order of time, and keep in his office, so that they may be at all times accessible, all the proceedings on every appeal or petition to him under this article, including his decision and orders founded thereon; and copies of all such papers and proceedings, authenticated by him under his seal of office, shall be evidence equally with the orginals."

The Rules of Practice before the Commissioner are contained in Handbook 1, and a copy thereof is attached hereto as Appendix 1.

This *judicial* power, thus designated by Education Law section 207 (referring to "the judicial functions of the commissioner of education") has been vested in the Commissioner and his predecessors since *1822*.

His judicial decisions have been reported, for the years 1913 to 1958 in the New York "State Department Reports",* Volumes 1 through 78, and since 1958 in the "Education Department Reports", copies of which latter series (of presently nine volumes) are contained in the United States Supreme Court Library.

This judicial function is largely appellate in nature in that it involves appeals to the Commissioner from determinations of subordinate bodies or officers in the State school system. The procedure is largely the same as in motion practice in the State Courts, in that an "appeal" is initiated by a petition which must be verified, served on all respondents and generally filed within 30 days from the determination complained of. The answer must be verified,

* Published by the Secretary of State.

served on all petitioners and filed within 20 days from service of the petition. The reply, if any, must be served and filed within 10 days thereafter. No "hearings" are held, *i.e.*, all factual matters must be presented by affidavit (see *Matter of O'Brien*, 76 State Dept. Rep. 136; 3 AD 2d 321; 3 NY 2d 881; *4 NY 2d 140;* 6 AD 2d 140; 5 NY 2d 709; 6 NY 2d 882; *sub nom. Murphy* v. *Commissioner of Education*, 361 U.S. 117). Briefs and memoranda of law are served and filed, and generally oral argument is held before the Commissioner and his Counsel (see Rules, section 276.2).

Relevant here also are the provisions of Education Law sections 306, 1706 and 2559, which read as follows:

> "§ 306. Removal of school officers; withholding public money.
>
> 1. Whenever it shall be proved to his satisfaction that any trustee, member of a board of education, clerk, collector, treasurer, district superintendent, superintendent of schools or other school officer is a member of an organization listed as subversive by the board of regents pursuant to the provisions of section three thousand twenty-two of this chapter, or has been guilty of any wilful violation or neglect of duty under this chapter, or any other act pertaining to common schools or other educational institution participating in state funds, or wilfully disobeying any decision, order, rule or regulation of the regents or of the commissioner of education, said commissioner, after a hearing at which the school officer shall have the right of representation by counsel, may, by an order under his hand and seal, which order shall be recorded in his office, remove such school officer from his office.
>
> 2. Said commissioner of education may also withhold from any district or city its share of the public money of the state for wilfully disobeying any provision of law or any decision, order or regulation as aforesaid."

"§ 1706. Power of removal or member of board of education. For cause shown, and after giving notice of the charge and opportunity of defense, the commissioner of education may remove any member of a board of education. Wilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty is cause for removal."

"§ 2559. Power of removal of member of board of education. For cause shown, and after giving notice of the charge and opportunity of defense, the commissioner of education may remove any member of a board of education. Wilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty, is cause for removal."

It will be noted that wilful disobedience of a judicial decision of the Commissioner of Education by a board of education is cause for removal from office (see *McGraw* v. *Wilson*, 75 State Dept. Rep. 11, 44; 286 App. Div. 930, 977).

While section 310, as indicated, prohibits State Court review in clear terms, the New York Courts have accepted a limited review of Commissioners' judicial decisions (see *Board of Education* v. *Allen*, 6 NY 2d 127; *Matter of Vetere* v. *Allen*, 15 NY 2d 259; *Matter of Ocean-Hill Brownsville* v. *Board of Education*, 23 NY 2d 483; on the impropriety of collateral attacks on judicial decisions of the Commissioner, see also *Chapin* v. *Board of Education*, 291 N. Y. 241).

We are not aware of any similar limitation on review of judicial decisions of the Commissioner of Education in the Federal Courts* and consequently there was and is no rea-

* *Taylor* v. *New York City Transit Authority*, 309 F. Supp. 785, aff. 433 F. 2d 665, was referred to in the opinion of the Court below, but present petitioner's reliance on that decision was wholly misunderstood by the Court. Taylor litigated his case before the administrative

(Footnote continued on following page)

son whatsoever why respondent in the cause at bar could not have sought review of this decision of the Commissioner (which will be reported as *Matter of James,* 10 Ed. Dept. Rep. 58), in the United States District Court for the Western District of New York.

This, however, he did not do. He ignored the decision of the forum of his choice and proceeded de novo.

1. This then poses a very difficult procedural problem. The Circuit Court has reversed the decision of the Commissioner in this action to which the Commissioner *is not a party.* That judgment is, therefore, void. The Commissioner is, hence, not bound by that decision, nor presumably is the Board of Education. If the Board of Education, however, disobeys the decision of the Commissioner of Education, removal of the Board could be sought by any qualified voter in the district "conceiving himself aggrieved". It is essential that the Commissioner not be placed in such a dilemma. The decision of the Circuit Court must be reversed for lack of jurisdiction over the person of the Commissioner of Education.

2. While the merits of this controversy cannot be reached, *Amicus,* nevertheless, wishes to emphasize his concern and disagreement with the Circuit Court's opinion, as Chief

(Footnote continued from preceding page)
agency and sought review of its decision in the State Courts. Instead of appealing the decision of the New York State Court of Appeals to the United States Supreme Court, however, he proceeded *de novo* in the United States District Court. While Judge WEINSTEIN did not wish to rely on *res judicata,* the Circuit Court stated clearly that *res judicata* applied. In so doing, the Circuit Court relied, in part, on *Board of Education* v. *Allen,* 6 NY 2d 127 (dealing with the judicial power of the Commissioner of Education and its statutory finality) as an illustration. Judge WEINSTEIN, in the District Court opinion, quoted New York State Education Law § 310 (judicial power of the Commissioner of Education) as being reviewable in the Federal Courts.

State School Officer of the State of New York. The following is, therefore, brought to the attention of the Court in the interest of the New York State Education system.

The Circuit Court opinion here rests on two basic theories:

a. That only physical disruption, threats of violence or protest by students, teachers or parents can be a sufficient basis for Board of Education action;

b. That the influence of this teacher's action on any student is not documented or proven in this litigation and must, therefore, be disregarded.

Both of these theories, however, do violence to the education process, the protection of which is the State constitutional and statutory function of *Amicus*.

It is absolutely essential that the impressionable young minds of the students be safeguarded against partisan indoctrination of any kind by individual teachers' personal leanings and views, especially where an individual purports to promote his views on a subject other than that in which the teacher has certificated professional competence and expertise. Where any kind of controversial issue is concerned, there are three basic requirements which the school system must meet:

(1) The student must be instructed by the expert assigned to the duty of teaching the subject of which the controversial question is a part. This will insure that the question and all related matters will be taught effectively and as completely as possible.

(2) The student must be given *all* pertinent information related to the subject, not just the personal views of an individual teacher. On the question here involved, for

instance, the war in Vietnam, the student must be given the position of the United States Government as well as that of opponents of that position, and in addition, must be given an overview of all the many and varied positions on the matter which are being espoused by various groups.

(3) The student must be given an opportunity, within the context of the two preceding requirements, to ask questions and discuss and debate the matter to the extent that time and the maturity level of the student will permit.

These three requirements are of the utmost importance because the student is taught to look up to and emulate the teacher and the influence of a teacher on an individual student will rarely be capable of being documented in any specific litigation. The result of such influence indeed may not surface for years. Such influence, further, may or may not cause serious problems when opposed to parental teachings.

The often quoted phrase that "the school is the marketplace of ideas" is both overboard and inapplicable to the elementary and secondary school system, except within well defined boundaries. A third grade mathematics class, for instance, is not the place for discussing foreign or domestic public policy or other matters not pertinent to the teaching of mathematics to students of that specific age and maturity level.

When the subject matter of modern foreign policy has been reached in a social studies class, then, and only then does that specific class become "the marketplace of ideas" on that specific subject, guided by a teacher whose function and duty it is to set forth the whole range of facts, theories and views on the subject. The individual views of

students must be f ed on the basis of full exposure to all known present ' thought on any given subject and it is the solemn duty the school system to make sure that the student receives ..ch full and unbiased exposure. The Board of Education, therefore, has the duty to protect the processes necessary to achieve this end and the decision of *Amicus* was based on that requirement. The opinion of the Circuit Court wholly fails to come to grips with the real issues here involved.

As indicated, however, the merits of this controversy cannot be reached on this record. Since the Circuit Court, however, has gone into these matters, *Amicus* wishes to record his views on the subject.

Questions Presented for Review

A PROCEDURE

1. Is it not axiomatic that a Court can impose judgment only on persons or officers who are parties to the litigation; and consequently, is not the judgment below void, since the Court did not acquire *jurisdiction over the person* of the Commissioner of Education who was neither named as a party nor intervened in this litigation?

2. Is it not axiomatic that respondent could have sought to *review the decision* of the Commissioner *in the Federal Courts* (or in the State Courts), but that he cannot ignore a judicial decision of the forum of his own choice, and that he cannot proceed *de novo*, ignoring his own choice of remedy?

3. Was the District Court not correct in holding the decision of the Commissioner to be *res judicata*, where respondent did not seek to review the decision in the United States District Court, but attempted to proceed *de novo*, in a collateral attack and without making the Commissioner a party defendant?

4. Was the Circuit Court not in error when it imputed to the District Court and to the petitioner and *amicus* the contention—which was never made nor even implied—that respondent had to "exhaust State judicial remedies"?

5. Was the District Court not correct when it stated: "The plaintiff did not appeal, as he had the right to do, but instead brought this action"?

6. Was it not error for the Circuit Court to condemn the proceedings before the Commissioner by characterizing the oral argument before him as "no more than an informal round-table discussion", "an informal discussion", "without a transcript being made", without having personal jurisdiction over the Commissioner and absent a proceeding to review the decision, in which review such matters could be pleaded and briefed?

B

MERITS

If the merits of this controversy could be reached for adjudication—which we urgently submit is impossible on this record—the following additional questions would be presented for review:

7. Was it not error for the Circuit Court to hold that only "breaches of discipline", "material and substantial disruption", "threatened disruption" or "protest from students, teachers or parents" would justify a board of education in taking action to protect the integrity of the educational process?

8. Was it not error for the Circuit Court to *say* that "material and substantial jeopardy to sound education" is a proper basis for board action, and that "we disclaim

any intent to condone partisan political actions in the public schools which reasonably may be expected to interfere with the educational process", and at the same time to *render judgment* to the contrary?

9. Was it not error for the Circuit Court to hold that: "Clearly, there was no attempt by James to proselytize his students" when obviously the wearing of the armband *in class*, and relating to a subject wholly divorced from his own teaching function, could have had no other conceivable purpose?

10. Was it not error for the Circuit Court to hold that the board of eduation was "arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings" *when the record contains not even a scintilla of evidence to that effect* and when, on the contrary, the board and the administration and the community, as brought out at oral argument before the Commissioner, was so deeply divided on this issue that strict neutrality on the part of the teaching staff was considered to be essential and imperative in the very interests of sound education, so as to offer the students the full range of thought on this controversial subject, and only within the subject area of instruction concerned with this subject?

11. Was it not error for the Circuit Court to ignore the Joint Code of Ethics, jointly adopted after much study by the New York State School Boards Association and the New York State Teachers Association which requires such neutrality exactly for the purpose of avoiding the evils so eloquently portrayed by the Circuit Court, of "allowing teachers to patrol the precincts of radical thoughts with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy"?

12. Was it not error for the Circuit Court to hold that "as far as we know [James' action] did not have any influence on any students" when the effect of political partisanship on the part of teachers obviously cannot be measured in terms of Court proceedings, but may have the most far reaching effects into the future development of individual pupils, because students are taught to look up to and emulate teachers?

13. Is not the existence of a substantial federal question here in any event clearly foreclosed by previous decisions of this Court?

ARGUMENT

POINT I

The judgment below is void for lack of jurisdiction over the person of the Commissioner of Education.

Respondent had the unquestioned right to challenge the legality of his dismissal either in the Federal Courts, or in the State Courts, or by an appeal to the Commissioner of Education under § 310 of the New York Education Law.

He voluntarily selected the remedy of an appeal to the Commissioner.

Not being satisfied with the decision of the Commissioner, *he again had a choice of three remedies.* He could have petitioned for a re-opening of the decision of the Commissioner. Or he could have brought a proceeding under Article 78 of the New York CPLR for a review of the decision, in the State Courts. Or, finally, he could have brought an action in the appropriate United States District Court against the Commissioner of Education, seeking a review of his decision. In case of both of the latter avenues of review, the Commissioner would have been

named as a party defendant or party respondent, so that the Court would have acquired jurisdiction *in personam* against the Commissioner, and thus the decision of the Court would have been binding on the Commissioner.

Here, however, ~~appellee~~ respondent did not seek to review the decision reached in the forum of his own choice. Rather he chose to wholly ignore that forum and decision, and proceeded *de novo*. The result is that the Commissioner is not a party to this litigation; *that the record before the Commissioner, on the basis of which he rendered his decision, is not before the Court;* that the procedure on appeals before the Commissioner was not known to the Court except through casual remarks made apparently at oral argument and reflected in some basic but erroneous assumptions woven into the decision—and which are wide of the mark; that judgment was pronounced against an officer who is not a party to this litigation and over whom the Court axiomatically has no jurisdiction; and in sum, that the judgment is void and necessarily a nullity.

> "Judge LEARNED HAND clearly set forth the limitations on the power of a Court in *Alemite Manufacturing Corp.* v. *Staff*, 2 Cir., 1939, 42 F. 2d 832, when he stated that:
>
> > "* * * no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; *its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.* * * *" (Emphasis added.)
>
> We think what Judge HAND said in that opinion clearly governs the situation before the court."
>
> *McCracken* v. *Pennsylvania Railroad*, 135 F. Supp. 660.

> "It would seem elementary that if the court has no jurisdiction over a defendant, the defendant has an unqualified right to have an order entered granting its motion to dismiss."

Read v. *Ulmer*, 308 F. 2d 915, 917 and cases cited there.

This rule of law is so basic that we do not wish to waste the time of the Court with a lengthy recital of decisions.

Three items in the Circuit Court's opinion illustrate the impropriety of the procedures here used:

1. a. The characterization of the oral argument before the Commissioner as "no more than an informal round-table discussion".

The Commissioner not being a party, could not be heard and did not have his day in Court. He had no opportunity to be heard, to plead, to brief any of the matters brought before the Court. Apart from the fact that Commissioners of Education have traditionally given Counsel the choice of presenting their oral argument either while standing or while sitting, the oral argument before the Commissioner is in no way different from oral argument before any other tribunal.

b. In erroneously seeking to distinguish *Taylor* (309 F. Supp. 785; aff. 433 F. 2d 665), the Circuit Court stated:

> "Since no transcript of the proceedings before Commissioner Nyquist was made, James cannot be charged with the failure to raise any of his claims. Suffice it to say that appellees conceded at oral argument that the broad range of James's grievances were discussed informally before the Commissioner."

As shown above under the heading: "Interest of the *Amicus Curiae*", the procedure before the Commissioner involves a full set of pleadings, memoranda of law, affidavits and all papers required in any judicial tribunal, as well as an oral argument such as is had in any Court.

The Circuit Court, of course, did not have before it the record on which the Commissioner's decision was based, the Commissioner not being a party to this litigation.

Instead of concluding—without any discernible basis whatever—that there was no record, the Court should have affirmed the decision of the District Court, the decision of the Commissioner having become *res judicata*, through respondent's own choice.

2. Respondent's ~~Appellee's~~ allegation that another teacher displayed the slogan "Peace with Honor" on his blackboard, which is made "on information and belief" and as to which ~~petitioner~~ ~~appellant~~ denies knowledge and information sufficient to form a belief, was used by the Circuit Court as a basis for its decision. Yet, there is no basis alleged by ~~appellee~~ respondent on which he could conclude (a) that it was the teacher who wrote the phrase on the blackboard; (b) that the teacher in fact knew that the writing was there; (c) that the writing was not written, if it was indeed written by the teacher, as a part of a social studies teacher's full explanation of opposing views on this matter; (d) that the teacher was not told to remove it and did so; (e) that the writing was the second time that the teacher wrote it (if indeed he did at all) and still was not disciplined—it will be noted that James was not dismissed for the first wearing of the armband, but only after the second time which second time was after instructions not to do so.

The salient point here is that the record before the Commissioner does not contain any such allegation. Had it done so, the ~~appellant~~ petitioner would have had an opportunity to ascertain the facts involved (the answer of ~~appellant~~ petitioner in the appeal before the Commissioner was verified just about one month after the respondent's dismissal. The allegation in question was not made until *one year and four*

months after the event alleged. Such a time lapse prejudices petitioners severely.

3. Before the Commissioner respondent alleged that he wore the armband as "a symbol of an opinion" which "was intended to convey to all who cared to observe the opinion and association of the petitioner with respect to the acts of the administration of the Government of the United States and its conduct of the war in Vietnam" (Paragraph 12 of Reply of Charles James, verified February 19, 1970 by Jeremiah S. Gutman, Esq., one of the Attorneys for Petitioner, who stated in said verification that "the grounds of deponent's belief as to all matters in the said Reply not stated upon his own knowledge are investigations which deponent has caused to be made concerning the subject matter of this Reply and information acquired by deponent in the course of his duties from the books and papers of said petitioner").

The complaint in the present action, however, on the contrary, now claims that James wore the armband "to express his deep religious conviction as a practicing Quaker", etc. The complaint is dated April 8, 1971—more than a year later—and is submitted by the same Jeremiah S. Gutman, Esq. (and other attorneys).

While this new allegation leaves the impression of an afterthought, it nevertheless points up the vice of the improper procedural route used by respondent.

It is apodictic, of course, that a teacher's religious convictions can give him no more "right" to attempt to indoctrinate his captive audience of students—especially where the manner of presentation eliminates all possibility of discussion, inquiry and debate—thus effectively eliminating the essentials of the basic learning process.

It is illuminating in this context, that the Court below stated in footnote 9: "In this posture of the proceedings, we must accept all factual allegations in the complaint as true".

We submit that this alone proves conclusively that the judgment below must be reversed.

POINT II

The decision of the Commissioner of Education is *res judicata*.

Respondent had the unquestioned right to appeal from the decision of *Amicus* to the appropriate Federal or State Court.

Instead of exercising that right, he brought the present action, ignoring the forum of his own choice.

In the appeal before the Commissioner, respondent was the petitioner and petitioner board of education was the respondent.

In the present action respondent again is the plaintiff and petitioner board again is the defendant.*

Both causes involve the identical parties and the identical set of facts.**

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* The present action also names the District Principal, the High School Principal and the President of the Board of Education as defendants. This, however, is immaterial since the decision of which respondent complains was made by the Board of Education and, under state law, could only be made by said Board of Education.

** Before the Commissioner, respondent claimed to base his position on seemingly purely political reasons. In the present action he claims purely religious motives (Complaint, paragraphs 4 and 5). The actual facts, however, are entirely identical. As far as the constitutional issues are concerned, it is immaterial whether a teacher attempts to indoctrinate his captive audience in foreign policy or in religion. There is, we submit, no constitutional protection for either course of conduct.

As this Court pointed out in *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, the conclusions of an appropriate forum "are not assailable collaterally except for fraud or lack of jurisdiction". There is no question of fraud involved here; and the jurisdiction of the Commissioner of Education is clearly and properly grounded in state law (in the latter connection, see *Bullock* v. *Cooley*, 225 N. Y. 566 and *Matter of Kabatt*, 52 State Dept. Rep. 59; 246 App. Div. 886; app. dism. 271 N. Y. 629; rearg. den. 272 N. Y. 508; cert. den. 300 U. S. 65; rehearing den. 300 U. S. 687).

Hence the doctrine of res judicata clearly applies.

As Chief Justice WARREN pointed out in *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322;

> ". . . [Under] the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties bars a second suit based on the same cause of action".

In *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, this Court stated:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appeals, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

To the same effect:

Marshall v. *Holmes*, 141 U. S. 589, 596;
American Surety Co. v. *Baldwin*, 287 U. S. 156;
Davis v. *Davis*, 305 U. S. 32;
Stoll v. *Gottlieb*, 308 U. S. 165;

Taylor v. *New York City Transit Authority*, 433 F. 2d 665 (2nd Circuit);

Lackawanna Police Benevolent Association v. *Balen*, 446 F. 2d 52 (2nd Circuit) ("no second bite at the cherry");

Howe v. *Brouse*, 422 F. 2d 347 (8th Circuit);

Scott v. *California Supreme Court*, 426 F. 2d 300 (9th Circuit).

It is submitted that the judgment below must be reversed.

POINT III

The judgment below fails to recognize the need of the educational processes to be protected from any partisan political or religious indoctrination.

As indicated above, the merits of the present controversy cannot, on this record, be reached.

Since the opinion of the Court below, however, if not reversed, would open the door to political and religious indoctrination of students by teachers forcing their own personal views, out of context, on the captive audience entrusted to them, it is important that *Amicus* present this aspect of the educational process which the Court below completely failed to understand and consider.

It is one of the most basic principles of all education that the student must be exposed to all existing knowledge on a given subject and in case of controversial subjects, to all the pertinent views taken on the subject by all concerned groups.

It so happens that the present controversy deals with the war in Southeast Asia. The concern of *Amicus*, however, is much broader than that subject. There are a great many

controversies in a great many subjects that from time to time forcefully occupy the minds of large segments of our society and which must be appropriately dealt with in the classroom.

The principle here at stake covers *all such subjects*, and thus the entire process of education. It is vital, therefore, not to limit the consideration of the issues to the specific subject matter here involved.

We would point specifically to the sixth paragraph of the Affidavit of Edwin J. Brown* (one of the nominal petitioners), which reads as follows:

> "6. I assured him that I recognized his right to hold any political views and to participate in political activities when not on duty as a teacher in the school. I felt that his wearing an arm band while on duty as a teacher was not proper. *I also explained to Mr. James that teachers could discuss controversial issues in school when they were timely and pertinent to the course being taught, but that right also carried with it the obligation to present objectively all known points of view on the issues. Having done this, the teacher could let it be known what his personal views were—emphasizing the rights of others to hold opposing views.*" (Emphasis supplied.)

This sworn statement (which is not controverted) is the key to the present case, as far as the merits of the controversy are concerned.

The statement is entirely in keeping with the concept of good education and as such with the various codes of ethics existing on this point for both teachers and school boards. It is, more particularly, submitted that the statement in no way interferes with the First Amendment rights of the teacher.

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* Appendix, p. 22a.

The teacher has no constitutionally protected right to indoctrinate his students with his own views, strong as the inclination to do so may be. It is his function to present the entire subject to his students, impart complete information on all sides of a controversial issue to them, and, most importantly, to provide an opportunity for questions, discussion and debate—provided always (1) that the subject falls within the teaching duties and expertise of the teacher and (2) that the specific question has been reached in the orderly development of the curricular context.

The educational processes cannot be effective unless these principles are carefully observed.

Assume, for instance, that a mathematics teacher feels strongly about certain issues relating to abortion and that he urges his own partisan views on his students, verbally or otherwise; or assume that a chemistry teacher urges his own partisan views about the death penalty on his students. This cannot serve the educational process, especially when the teacher is not the designated expert on these subjects.

If he does so verbally, thus taking class time away from his assigned subject, the *Goldwasser* case* disposes of that problem, even based on the much too narrow view of that decision taken by the Court below.

But if he does so, without taking class time, he necessarily eliminates the basic precept of free speech, the freedom to exchange ideas, to discuss and debate, without which the

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* *Goldwasser* v. *Brown*, 417 F. 2d 1169, cert. den. 397 U. S. 922, which the Court below sought to distinguish on this very basis. Actually, the Court based its decision on three grounds, two of which clearly apply to, and are supportive of, the decision of the Commissioner so improperly invalidated in this action: (1) The time limitations involved; (2) the fact that Goldwasser was deviating from his curricular context, and (3) the effect on the students.

concept of freedom of speech loses all of its meaning.* Such a course of conduct, indeed, imposes the "pall of orthodoxy" on the classroom.

As Mr. Justice DOUGLAS pointed out in *Terminiello* v. *Chicago*, 337 U. S. 1, 4:

> "[The] function of free speech under our system of government is to invite dispute."

But what kind of dispute can be offered by a student in an English class who is supposed to pay attention to the subject matter of English instruction, and who may or may not wish to dispute the theories espoused by the English teacher's black armband? He is learning the teacher's views on an aspect of the subject of social studies as to which he is clearly barred, by circumstances, from inquiry and debate. Thus the whole basis for constitutional protection of free speech is here clearly lacking.

As Judge KAUFMAN stated (45 N. Y. U. Law Review 761): "The First Amendment is basically aimed at regulating the process of exchanging ideas and forming opinions." The English teacher and his armband, however, offer no opportunity for an *exchange* of ideas—he offers only one-sided indoctrination.

When Judge LEARNED HAND said ". . . we must not yield a foot upon demanding a fair field and an honest race to all ideas" (T. Dilliard "Learned Hand, The Spirit of

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* Jefferson expressed this so well, when he said:

> ". . . that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."

(The works of Thomas Jefferson, Paul L. Ford, ed., N. Y. 1904, II. 440-41.)

Liberty", 284, 3rd ed. 1960), he decided the merits of the cause at bar. The English teacher with his armband interferes with the "honest race," and destroys the "fair field".

To educate means to shape the mind of the student by imparting all available knowledge and giving the student a complete basis for forming his own opinions on issues and questions.

It is important to recognize that the teacher in the classroom does not deal with his peers. Very few students will be able to discount such deviations from the concept of true teaching. Thus, even where the teacher's views are imparted without taking class time, as here, the present impact on the student will cause the student's mind to wander from the scheduled subject, especially in the many cases where parental teachings and opinions conflict with the view thus expressed by the teacher—with the result of actual interference with the educational process, even though the student remains silent, present and seated in his class. Nor can it be expected that the students in such cases will have strong enough convictions or indeed sufficient factual information to lodge an objection or protest with a teacher. He is there to learn, both through express verbal teaching and by the example and conduct of the teacher.

It is *Amicus'* position, in short, that not only external interference with the educative process, such as through physical violence, protest demonstration, destruction of property and the like, must be dealt with by the Board of Education, but that the Board of Education is equally responsible for protecting the inner workings of the education process, by eliminating any course of conduct that improperly interferes with the development of an informed student's mind.

The needs of education in this respect have long been recognized by the educational community of the State. About 1950 the New York State School Boards Association (representing practically all school boards in the State) and the New York State Teachers Association (representing the vast majority of the teachers of the State outside of the City School District of the City of New York), jointly adopted a Code of Ethics, based on lengthy study and consideration by joint and separate committees. While the State Teachers Association has changed its adherence from that Code to the Code of Ethics adopted by the National Education Association, the principles enunciated in all these Codes are the same on the subject.

The former Joint Code required both teacher and school board to "refrain from using the school to promote personal views on religion, race or partisan politics." The School Board Code (adopted 1960) requires the board to "preserve the *right and obligation* of teachers to teach controversial issues fairly and without bias." (Emphasis supplied.) The National Education Association Code (adopted 1970) requires the teacher not to "deny the student access to varying points of view"; "not [to] use professional relationships with students for private advantage"; and "not [to] use institutional privileges . . . to promote political candidates or partisan political activities".

In this context, it is also noteworthy that this principle is also recognized by today's high school and college students themselves, as indicated in a recent Gallup poll, reported in the September 1972 issue of the Reader's Digest, page 78. The following appears on page 82:

> "What can be done to bring the forces of left and right into better balance throughout the country? The responses of the young point the way. All the groups that we questioned, including both extremes, accept the

principle that 'high schools and colleges have a responsibility to see that students are presented with both sides when political issues are discussed.' In not one of the groups was the vote in favor of this principle less than 87 percent. Moreover, the same agreement was found with respect to textbooks and reading matter used in courses that deal with political and social problems. The percentage of those who agree that 'both liberal and conservative viewpoints should be presented' was also in the high 80s.

On a far tougher, more revealing question, a majority agreed with the principle of maintaining ideological balance. The question was: 'In colleges where a majority of the professors in the social sciences are conservative or liberal, should the next professors appointed be of the opposite view—assuming that they are equally qualified to teach?' The vote was 54 percent "yes," 27 percent "no."

The important fact is that young Americans accept the general principle that students should be exposed to both conservative and liberal viewpoints—with the opportunity and the right to make up their own minds on the basis of a full and fair presentation of both sides of political issues. This is a challenge from the young that our institutions of higher learning must now soberly consider—and act upon forthwith—if we are to have a truly informed electorate capable of making intelligent judgments in the critical years ahead."

In sum, if the merits were to be reached, we would ask the Court to find an accommodation of the right of free speech on one side, and the essential needs of the public school system which are so intimately intertwined with our constitutional fabric, on the other side.

Hence, even if the merits of this controversy could be reached for adjudication, which we submit is impossible on this record, the judgment below would, nevertheless, need to be reversed in any event.

POINT IV

The existence of a substantial federal question is in any event foreclosed by previous holdings of this Court.

Respondent claims jurisdiction pursuant to 28 U. S. C. section 1343, subdivision 3 and 42 U. S. C. section 1983.

In order to find jurisdiction in the Federal Courts, therefore, it is necessary to find that under color of State Law respondent has been deprived of a right or privilege secured to him by the United States Constitution.

1. There is no question whatever but that respondent has the right freely to express his opinions. No constitutional right, however, is unlimited. Respondent could not, for instance, use the Federal Courtroom for the purposes of making a speech expressing his opinions on whatever problems he chooses to address himself to.

2. In the setting of the public school system, the students are a captive audience. They are required to be present, except to the extent that they wish to attend nonpublic school; they are required to listen to the teachers, to obey their commands and to participate in whatever program the teacher sets before them.

The pupils are taught by their parents and others to look up to, obey and emulate their teachers. Thus, the teacher has the very delicate, highly responsible and most important obligation to teach these young minds all the facts in his subject which they must know in order to enter the mainstream of society, through developing informed opinions.

3. There is no right or privilege secured to any teacher by the United States Constitution to abuse his highly responsible and delicate position as a teacher by using the

captive audience of his students to teach them his own partisan opinions to the exclusion of all other views on the subject.

Respondent herein is a teacher of English; it is not his job to teach foreign affairs, social studies, mathematics or any other subject except the English language.

By wearing his black armband he unilaterally taught them that the United States foreign policy is wrong.

By wearing a red armband with a white inset showing the hammer and sickle he would teach them that all so called "capitalism" is wrong.

By wearing a red armband with a white inset showing the swastika he would teach them that "democracy" is wrong and that the Jews are responsible for all the ills of this world.

By wearing an orange armband on St. Patrick's Day he would teach them that the Roman Catholic Church is wrong and responsible for all sorts of troubles.

The potential list of uses of this type of symbolic speech is rather lengthy since not limited to the wearing of armbands, and the list can be widely expanded as new symbols and new issues arise or old issues reemerge*.

In all these manifestations of symbolic teaching *out of context*, of course, it must be kept in mind that no opportunity for inquiry, debate and discussion exist, so that, as pointed out in Point III, *supra*, the very basis for the concept of free speech and its constitutional protection is lacking.

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* *Cf. Lapolla* v. *Dullaghan*, 63 Misc. 2d 157 (lowering of flag); *Nistad* v. *Board of Education*, 61 Misc. 2d 60 (closing of school); *O'Connor* v. *Hendrick*, 184 N. Y. 421 (religious garb).

This type of indoctrination is, of course, violative of the basic requirement of *governmental neutrality* in matters of religion and politics.

The following language from the decision of the United States Supreme Court in *West Virginia* v. *Barnett*, 319 U. S. 624, is here dispositive:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . ."

and again:

> "Free public education, if faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party or faction."

The following statements of this Court in the *Cox* cases (379 U. S. 536 and 559) are here directly in point:

> "From these decisions certain clear principles emerge. The right of free speech and assembly, while fundamental in our democratic society still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy." (p. 554.)

and further:

> "We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." (p. 574.)

Paraphrasing another statement of this Court from page 564:

> "We hold that this [decision] on its face is a valid [decision] dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."

The requirement of complete neutrality of the school system in matters of religion, politics and other controversial areas has been announced again and again by this Court:

Meyer v. *Nebraska*, 262 U. S. 390;
United Public Workers v. *Mitchell*, 330 U. S. 75;
Engel v. *Vitale*, 370 U. S. 421;
Adderly v. *Florida*, 385 U. S. 39, 48;
Board of Education v. *Allen*, 392 U. S. 236, 242;
Epperson v. *Arkansas*, 393 U. S. 97;
Walz v. *Tax Commission*, 397 U. S. 664;
Lemon v. *Kurtzman*, 403 U. S. 602, 618.

It is respectfully submitted, therefore, that the existence of a substantial Federal question is here completely foreclosed in any event by previous decisions of this Court. The judgment below must, therefore, be reversed.

Conclusion

The Court below pronounced judgment against the Commissioner of Education without ever acquiring jurisdiction over his person.

Absent such jurisdiction and absent a review of the decision of the Commissioner in the Federal Courts (or even State Courts) the decision of the Commissioner has become *res judicata.*

The existence of a substantial Federal question here is clearly foreclosed by previous decisions of this Court.

In addition, the judgment below ignores fundamental and compelling State interests in protecting the educative processes.

The judgment below was in error in authorizing partisan political activity in contravention of the precepts of the requirement of governmental neutrality in matters of politics and religion.

For all these reasons the judgment below must be reversed.

Respectfully submitted,

JOHN P. JEHU,
Associate Counsel,
Attorney for Commissioner of Education, Amicus Curiae,
State Education Building,
Albany, New York 12224,
Tel: (518) 474-6150.

ROBERT D. STONE,
Counsel and Deputy Commissioner for Legal Affairs.

APPENDIX A

NYCLU
New York Civil Liberties Union,
84 Fifth Avenue, New York, N. Y. 10011,
Telephone 924-7800.

BURT NEUBORNE,
Staff Counsel.

October 9, 1972.

John P. Jehu
The University of the State of
New York
The State Education Department
Albany, New York 12224

Dear Mr. Jehu:

Mr. Neuborne has instructed me to reply to your letter of September 29, 1972. He has no objection to the filing of a Brief *Amicus Curiae* by the Commissioner of Education in the *James* case.

Very truly yours,

TOBY JO PLATT,
TOBY JO PLATT

Received
Oct 12 1972
Office Of The
Counsel

APPENDIX B

HARRY TREININ
Attorney at Law
11 East Market Street
Corning, N. Y. 14830
Telephone 962-3167
Area Code 607

October 2, 1972

Dr. John P. Jehu
Associate Counsel
Education Department
State Education Building
Albany, New York 12224

Re: James case

Dear Dr. Jehu:

As counsel to the Board of Education, Central School District No. 1, Towns of Addison, *et al*, which is filing a petition for certiorari to the United States Supreme Court in the above matter, I would most welcome your filing of a brief on behalf of the Commissioner of Education as *amicus curiae*.

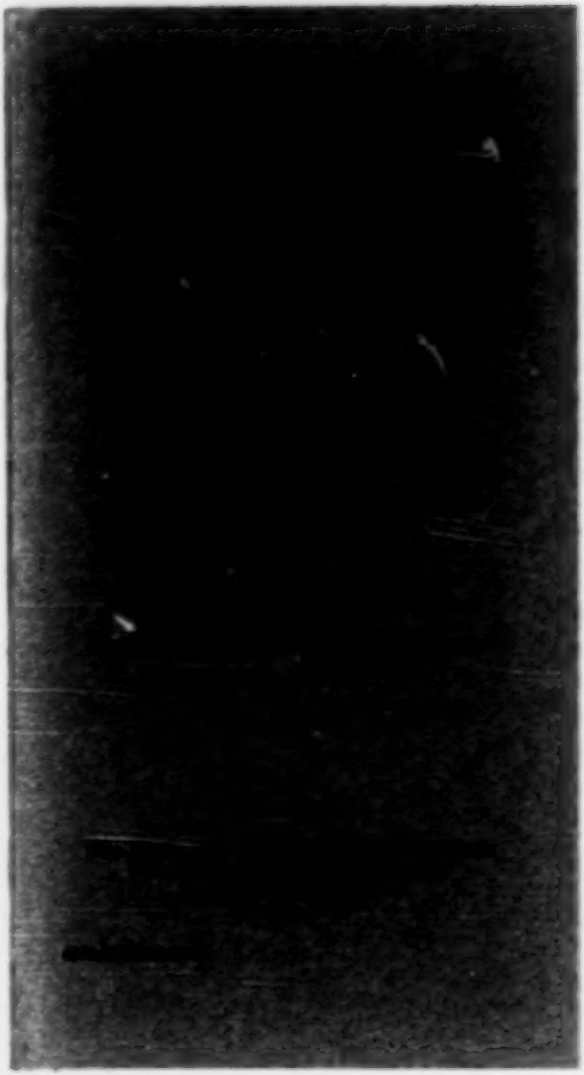
Sincerely yours,

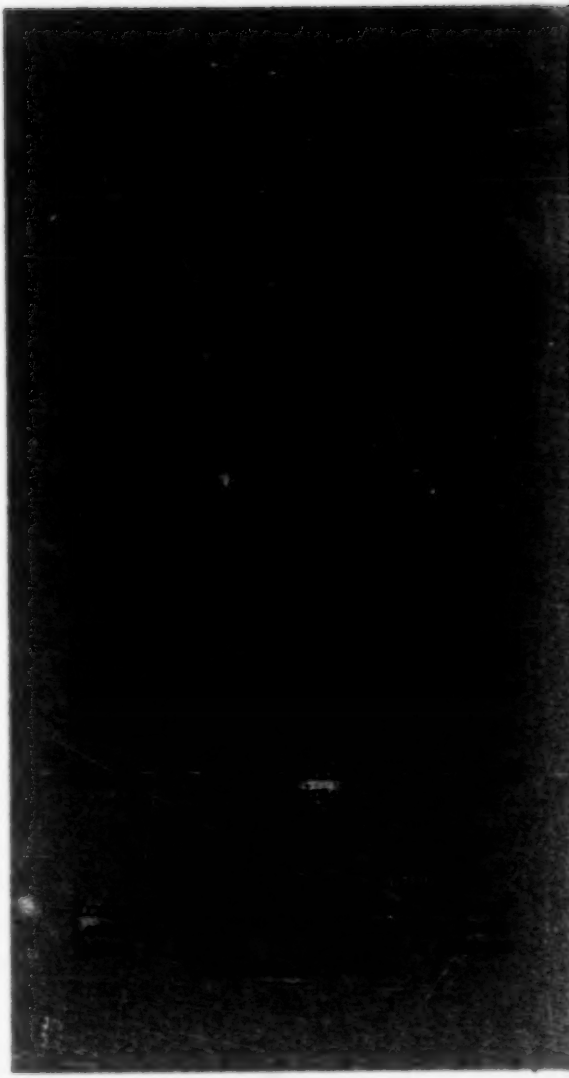
klr

HARRY TREININ
HARRY TEININ

Received
Oct 4 1972
Office Of The
Counsel

APPENDIX 1





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FOREWORD

Education Law section 310 provides that any person considering himself aggrieved by any action taken at a school district meeting or by school authorities may appeal to the Commissioner of Education for a review of such action.

In order to provide orderly and expeditious procedures for the presentation and defense of such appeals, and for the conduct of proceedings for the removal of school officials pursuant to Education Law section 306, the Commissioner of Education has from time to time promulgated regulations governing the practice to be followed.

In order to keep pace with current thinking concerning practice in quasi-judicial proceedings, the regulations of the Commissioner governing practice on appeals under section 310 have been substantially revised, effective November 1, 1969. Those familiar with the prior regulations will note the following major changes:

- the material has been reorganized under two major headings — parties and pleadings, and rules of practice.
- each petition initiating an appeal must be accompanied by a notice advising the respondent of his right to file and serve an answer.
- the regulations have been renumbered to correspond with the numbering system used in the Official Compilation of Codes, Rules and Regulations of the State of New York, in which the regulations of all state departments and agencies are published.
- provision has been made for the first time for bringing of class appeals.
- specific provision has been made for appearances amicus curiae.
- procedures are specific governing applications for extension of time to answer or reply, for adjournment of oral argument, and for reopening and reargument.

With the hope that ready access to the revised regulations will be of assistance to those wishing to bring appeals to the Commissioner, to those against whom such appeals may be brought, and to their attorneys, the regulations and the applicable statutory provisions are set forth in this pamphlet.

ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs
State Education Department

August 1, 1969

Selected Sections of the Education Law

Appeals or Petitions to Commissioner of Education

Article 7 of the Education Law provides in part as follows:

§ 310. **Appeals or petitions to commissioner of education and other proceedings.** Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§ 311. **Powers of commissioner upon appeals or petitions, et cetera.** The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

§ 312. **Filed papers and copies thereof.** The commissioner shall file, arrange in the order of time, and keep in his office, so that they may be at all times accessible, all the proceedings on every

appeal or petition to him under this article, including his decision and orders founded thereon; and copies of all such papers and proceedings, authenticated by him under his seal of office, shall be evidence equally with the originals.

Appeals in Special Cases

Reviewability of acts of district superintendents:

§ 2217. **Appeals from acts of district superintendent.** Appeals from the official acts of a district superintendent of schools or from his refusal or failure to act in any matter in which he may legally act, may be taken to the commissioner of education. All questions in controversy relating to the election of such district superintendent shall be determined by the commissioner of education on proper appeal. The provisions of article seven of this chapter shall apply to and govern such appeals and decisions therein.

Determination of disputes involving meetings or elections:

§ 2037. **Determination of meeting or election disputes.** All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and his decisions in the matter shall be final and not subject to review. The commissioner may in his discretion order a new meeting or election.

Determination of what constitutes ordinary contingent expenses:

§ 2024. **Reference to commissioner of education.** If any question shall arise as to what are ordinary contingent expenses the same may be referred to the commissioner of education, by a statement in writing, signed by one or more of each of the opposing parties upon the question, and the decision of the commissioner shall be conclusive.

Enforcement

As an aid in the enforcement of the law and the decisions of the Commissioner of Education, section 306 of the Education Law provides as follows:

§ 306. **Removal of school officers; withholding public money.** 1. Whenever it shall be proved to his satisfaction that any trustee, member of a board of education, clerk, collector, treasurer, district superintendent, superintendent of schools or other school officer is a member of an organization listed as subversive by the board of regents pursuant to the provisions of section three thousand twenty-two of this chapter, or has been guilty of any wilful violation or neglect of duty under this chapter, or any other act pertaining to common schools or other educational institution participating in state funds, or wilfully disobeying any decision, order, rule or regulation of the regents or of the commissioner of education, said commissioner, after a hearing at which the school officer shall have the right of representation by counsel, may, by an order under his hand and seal, which order shall be recorded in his office, remove such school officer from his office.

2. Said commissioner of education may also withhold from any district or city its share of the public money of the state for wilfully disobeying any provision of law or any decision, order or regulation as aforesaid.

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Part 275

Parties and Pleadings

§ 275.1. **Parties.** The party commencing an appeal shall be known as petitioner or appellant and any adverse party, as respondent. After an appeal is commenced in accordance with these rules, no party shall be joined or be permitted to intervene, except by leave or direction of the Commissioner of Education.

§ 275.2. **Class appeals.**

(*a*) When allowed, an appeal may be maintained by one or more individuals on their own behalf and as representatives of a class of named or unnamed individuals only where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class. Minor variations of fact shall not preclude the maintenance of a class appeal when such variations are irrelevant for purposes of the decision.

(*b*) Protective orders. The Commissioner may at any stage of the appeal issue such orders as may be necessary to fairly and adequately protect the interests of the persons on whose behalf the appeal is brought.

§ 275.3. **Types of pleadings.** There shall be a petition, an answer, and, if new matter is alleged in the answer, a reply thereto. The Commissioner may permit or require additional pleadings upon such terms and conditions as he may specify. The form of all pleadings shall be so construed as to do substantial justice. All pleadings must be typewritten, addressed "To the Commissioner of Edu-

cation," must contain the allegations of the parties in numbered paragraphs and must be filed in accordance with section 275.9 of this Part.

§ 275.4. **Names of parties or attorneys to be endorsed on all papers.** All pleadings and papers submitted to the Commissioner in connection with an appeal must be endorsed with the name, post office address and telephone number of the party submitting the same, or, if a party is represented by counsel, with the name, post office address and telephone number of his attorney.

§ 275.5. **Verification.** All pleadings shall be verified. The petition must be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustee or the board of trustees or board of education of a school district, it must be signed by one of such trustees or a member of such board who is familiar with the facts underlying the appeal, pursuant to a resolution of such board authorizing the commencement of such appeal on behalf of such trustees or board. An answer shall be verified by the oath of the respondent submitting the same. If, however, the appeal is brought from the action of the trustee or the board of trustees or board of education of a school district, verification of the answer shall be made by one of such trustees or a member of such board who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer must be made by at least one of them who is familiar with the facts. A reply shall be verified in the manner set forth for the verification of an answer.

§ 275.6. **Affidavit of verification.** The affidavit of verification shall be in the following form:

STATE OF NEW YORK }
COUNTY OF ..... } ss

.....being duly sworn, deposes and says that he is..... in this proceeding; that he has read the annexed ..... and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

.....
[*Signature*]

Subscribed and sworn to before me
this ..... day of .....
19.....

.....
[*Signature and title of officer*]

§ 275.7. **Oaths.** All oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York. The statement of an attorney admitted to practice in the courts of this State and appearing in an appeal as attorney of record or of counsel to the attorney of record, when subscribed and affirmed by him to be true under the penalty of perjury, may be served or filed in the appeal in lieu of and with the same force and effect as an affidavit.

§ 275.8. **Service of pleadings and supporting documents.**

(*a*) *Petition.* A copy of the petition and of all papers annexed thereto shall be personally served upon each named respondent, or, if he cannot be found upon diligent search, by delivering and leaving the same at his residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening. If a school district is named as a party respondent, service upon such school district shall be made personally by delivering a copy of the petition to the district clerk or to any trustee or any member of the board of education of such school district. Pleadings may be served by any person not a party to the appeal over the age of 18 years.

(*b*) *Subsequent pleadings and papers.* All subsequent pleadings and papers shall be served upon the adverse party, or if the adverse party is represented by counsel, upon his attorney. When the same attorney appears for two or more parties, only one copy need be served upon him. Service of all pleadings subsequent to the petition shall be made by registered mail, return receipt requested, or by personal service.

(*c*) *Award of bid.* If an appeal involves the award of a contract pursuant to Article 5-A of the General Municipal Law or pursuant to subdivision 14 of section 305 of the Education Law and a party other than the appellant has been designated as the successful bidder or has been awarded a contract, such successful bidder must

be joined as a respondent and must be served with a copy of the petition. In such case, the respondent board of education or board of trustees shall forward to the Commissioner within twenty days after service of the petition on appeal, a copy of the notice to bidders together with proof of publication thereof, a copy of the specifications and copies of all bids or proposals.

(*d*) *Disputed elections.* If an appeal involves the validity of a school district meeting or election or the eligibility of a district officer, a copy of the petition must be served upon the trustee or board of trustees or board of education as the case may be, and upon each person whose right to hold office is disputed and such person must be joined as a respondent. In such case, except where the eligibility of a district officer is involved, any qualified voter may serve and file an answer in such appeal, whether or not the trustee or board of trustees or board of education serves and files an answer therein.

§ 275.9. **Filing.** Within five days after the service of any pleading or paper, the original, together with the affidavit of verification, an affidavit proving the service of a copy thereof and the registry receipt where service by registered mail has been effected shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224. The affidavit of service shall be in the form set forth below and shall indicate the name and official character of the person upon whom service was made.

Form for Affidavit of Personal Service

STATE OF NEW YORK }
COUNTY OF ..... } ss

....., being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the ..... day of ....., 19....., at No. ..... Street, in the town of ....., county of ....., State of New York, he served the annexed ..... on ..... by delivering to and leaving with said ....at said time and place a true copy thereof.

Deponent further says he knew the person so served to be the said ....., who is .... in said district.

.....
[*Signature*]

Subscribed and sworn to before me
this ..... day of .....,
19.....

.....
[*Signature and title of officer*]

Form of Affidavit of Service by Registered Mail

STATE OF NEW YORK }
} ss
COUNTY OF ..... }

....., being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the ..... day of ....., 19....., deponent served the within ..... upon ..... in this action, at ....., the addresses designated by ..... for that purpose by depositing a true copy of the same by registered mail, return receipt requested, enclosed in a postpaid properly addressed wrapper, in ..... a post office ..... official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

.....
[*Signature*]

Subscribed and sworn to before me
this day of
19

§ 275.10. **Contents of petition.** The petition shall contain a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief, and shall further contain a demand for the relief to which the petitioner deems himself entitled. Such statement must be sufficiently clear to advise the respondent of the nature of petitioner's claim and of the specific act or acts complained of.

§ 275.11. **Notice with petition.** Each petition must contain the following notice:

"NOTICE:

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the Rules Relating to Appeals Before the Commissioner of Education, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224.

If an answer is not served and filed in accordance with the provisions of such Rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the Commissioner.

Please take notice that such Rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224."

§ 275.12. **Contents of answer.** The answer of each respondent shall contain a clear and concise statement of his defenses to each claim and shall either admit or deny the allegations of the petition. In addition, each respondent may set forth affirmative defenses or defenses by way of avoidance. If more than one respondent has been named and served and if common questions of law or fact are involved, the respondents, if otherwise united in interest, may submit a joint answer to the petition.

§ 275.13. **Service of answer.** Each respondent upon whom a copy of the petition has been served must, within 20 days from the time of such service, answer the same, either by concurring in a statement of facts with the petitioner or by service of an answer, together with any necessary supporting documentation. The date upon which personal service was made upon respondent shall be excluded in the computation of the 20-day period. If the last day for service of an answer falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

§ 275.14. **Reply.** The petitioner shall reply to each affirmative defense contained in an answer. The reply shall be served within 10 days after service of the answer to which it responds in the manner set forth in section 275.8 (*b*). If the answer has been served by mail upon petitioner or his counsel, the date of mailing and the two days subsequent thereto shall be excluded in computing the 10-day period. If the last day for service of reply falls on

a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

§ 275.15. **Representation by attorney.** A party other than a school district or a corporation may prosecute or defend an appeal before the Commissioner in person or by an attorney. A school district or a corporate party may appear only by an attorney.

§ 275.16. **Limitation of time for initiation of appeal.** An appeal to the Commissioner must be instituted within thirty days from the making of the decision or the performance of the act complained of. The Commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

§ 275.17. **Amicus curiae.** The Commissioner may, in his sole discretion and upon written application submitted at or before oral argument, permit interested persons or organizations to submit memoranda of law amicus curiae in connection with a pending appeal. Those permitted to submit memoranda amicus curiae shall not be considered parties to the appeal before the Commissioner and shall not be entitled to receive copies of pleadings and papers pertaining thereto or to participate in oral argument.

Part 276

Rules of Practice

§ 276.1. **Stay of proceedings.** The initiation of an appeal shall not, in and of itself, effect a stay

of any proceedings on the part of any respondent. If the petitioner desires a stay, he shall make application therefor by a duly verified petition, stating the facts and the law upon which such stay should be granted. The Commissioner may, in his discretion, with or without application therefor, grant a stay if in his judgment the issuance of such a stay is necessary to protect the interests of the parties, or any of them, pending an ultimate determination of the appeal.

§ 276.2. **Oral argument.**

(*a*) If a petitioner desires an opportunity for oral argument before the Commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent, or if there be more than one, a respondent may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument but respondent has made a time by request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(*b*) The Commissioner may, in his sole discretion, determine whether oral argument shall be had.

(*c*) Argument on appeals to the Commissioner may be heard before the Commissioner, the Acting Commissioner or the Counsel.

(*d*) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(*e*) Adjournment of the date of oral argument. Once an appeal has been scheduled for oral argu-

ment on a particular date by the Office of Counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the Commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the Office of Counsel, must be postmarked not later than five days prior to the date on which oral argument is scheduled to be heard, and shall set forth in full the reasons for the request.

(*f*) The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the Commissioner extends such time.

§ 276.3. **Extensions of time to answer or reply.** No extension of time to answer the petition or to reply to an answer will be granted by the Commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, address to the Office of Counsel, must be postmarked not later than five days prior to the date on which the time to answer or reply will expire, and shall set forth in full the reasons for the request. The time to answer a pleading may not be extended solely by stipulation of the parties or their counsel.

§ 276.4. **Briefs.** Memoranda of law may be submitted by any party to an appeal or by an amicus curiae, and may be requested by the Commissioner or by his Counsel.

§ 276.5. **Records and reports.** The Commissioner may, in his discretion, in the determination

of an appeal, take into consideration any official records or reports on file in the Education Department which relate to the issues involved in such an appeal.

§ 276.6. **Decisions to be filed.** A copy of the decision of the Commissioner in an appeal will be forwarded by the Office of Counsel to all parties to the appeal, or, if they be represented by counsel, to counsel for the respective parties, with instructions for service and filing as may be appropriate. A copy will also be sent to those persons or organizations who have been granted leave to submit memoranda amicus curiae.

§ 276.7. **Reopening of a prior decision.** Any party to an appeal may, within 30 days after the date of a decision thereon, appeal to the Commissioner for a reopening of said decision and for a reconsideration thereof. Service of the application shall be made in the manner set forth for service of an answer. Motions for reopening of a prior decision are addressed solely to the discretion of the Commissioner and will not be granted in the absence of a showing that the decision appealed from was rendered under a misapprehension as to the facts or that there is new and material evidence which was not available at the time the original decision was made. Affidavits in opposition to an application for reopening may be submitted by any parties opposing the same. No oral argument shall be had in connection with an application for reopening. If the Commissioner finds that there is no adequate basis for a reopening, he will render a decision to the effect.

§ 276.8. **Reargument.**

(*a*) If the Commissioner, in his discretion, is satisfied that justice will be served by reconsideration of the decision, he will give notice of his decision to all of the parties to the initial decision. The provisions relating to practice and pleadings shall be applicable, and, for the purpose of reargument, the application for reopening shall be treated as the petition. In such case, the Commissioner may define and limit the issues to be considered and may restrict the time for service of pleadings.

(*b*) The Commissioner may, on his own motion, reopen a prior decision in the absence of an application therefor where in his judgment the interests of justice will be served thereby.

§ 276.9. **Dismissal of appeal.** The Commissioner may, in his discretion, and at any stage of the proceedings, dismiss an appeal if it appears to his satisfaction that the petition does not set forth a clear and concise statement of the petitioner's claim or that the appeal has become academic.

Part 277

Practice on Application for Removal of School Officers

§ 277.1. **Initiation and conduct of proceeding.** An application seeking the removal of a school officer must be made in accordance with Parts 275 and 276 hereof, as far as possible, except

(*a*) the petition must distinctly state the wilful violation of law, neglect of duty, or wilful disobedience of a decision, order or regulation of the

Commissioner charged against the officer and the facts by which it is established; such facts must be set forth with such certainty as to time, place and all other pertinent details, as to furnish the officer with precise information as to what he is expected to meet; if the charge is wilful disobedience of a decision or order of the Commissioner, a copy thereof must be attached to the petition;

(*b*) the petition must include a notice to the officer in substantially the form on the following page:

"SIR:

Take notice that the petition and affidavits, copies of which are herewith served upon you, will be presented to the Commissioner of Education at Albany, and application thereon made for your removal from the office of..... of..... School District number ..... of the Town of..... .....County, and that you are required to transmit your answer to such application, duly verified, with an affidavit of service of a copy thereof upon petitioner, to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York, 12224, or the charges contained in such petition and affidavit will be deemed to be admitted by you.

.....
[*Signature*]

P.O. Address....."

§ 277.2. **Initiation by Commissioner.** Such proceeding may be instituted by the Commissioner upon his own motion by the service of an order to show cause and thereafter the procedure as outlined in Parts 275 and 276 hereof shall be followed so far as applicable.

§ 277.3. **Authorized hearing officers.** Hearings and proceedings for removal of school officers may be held before the Acting Commissioner of Education or the Counsel.

The following is a conversion table indicating the amended regulations and showing their present equivalents in Title 8, Official Compilation, Codes, Rules and Regulations:

275.1	Added
275.2	Added
275.3	276.1, 276.6, 276.7
275.4	275.3, 276.11 (b)
275.5	276.10
275.6	276.10
275.7	276.8 (a)
275.8 (a)	276.4 (a) (1)
(b)	276.6 (b)
(c)	276.4 (a) (3)
(d)	276.4 (a) (2)
275.9	276.4 (c), 276.6 (c)
275.10	275.1, 275.2
275.11	Added
275.12	276.6
275.13	276.6 (b)
275.14	276.7
275.15	Added
275.16	276.5

275.17	Added
276.1	276.9
276.2 (a)	Added
(b)	276.12 (a)
(c)	276.12 (b)
(d)	276.12 (d)
(e)	Added
(f)	276.12 (c)
276.3	Added
276.4	Added
276.5	276.14
276.6	276.13 (b)
276.7	Added
276.8	Added
276.9	Added
277.1 a	277.1 a
277.1 b	277.1 b
277.2	277.2
277.3	277.3

The following is a conversion table indicating the present sections as numbered in Title 8, Official Compilation, Codes, Rules and Regulations of the State of New York and their equivalent sections under the amended regulations:

276.1	275.3, 275.5
276.2	Omitted
276.3	Omitted
276.4 a 1	275.8 a
2	275.8 d
3	275.8 c
b	275.8 a
c	275.9
276.5	275.16

276.6	a	Omitted
	b	275.13, 275.1
	c	275.9
276.7		275.14
276.8	a	275.5, 275.6, 275.7
	b	Omitted
276.9		276.1
276.10		275.5, 275.6
276.11	a	Omitted
	b	275.4
276.12	a	276.2 (a) (b)
	b	276.2 (c)
	c	276.2 (f)
	d	276.2 (d)
276.13	a	Omitted
	b	276.6
276.14		276.5
277.1 a		2771. a
277.1 b		277.1 b
277.2		277.2
277.3		277.3

APPENDIX 2

(SEAL) No. 8195

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
Before the Commissioner

In the Matter
of
The Appeal of CHARLES JAMES from action of the Board of Education of Central School District No. 1 of the Towns of Addison, Cameron, Rathbone, Tuscarora, Woodhull, Thurston, Erwin, Lindley and Canisteo, Steuben County, relating to the dismissal of a probationary teacher.

Levy, Gutman & Goldberg, Esqs., Attorneys for Petitioner, Jeremiah S. Gutman, Esq., of Counsel.
Harry Treinin, Esq., Attorney for Respondent.

Petitioner, a probationary teacher of English at Addison Central High School in respondent's district, was suspended by respondent for wearing a black armband in class on November 14, 1969, a Vietnam Moratorium Day. Thereafter, he was informed by respondent that he could return to his teaching duties with the understanding that he "engage in no political activity while in the school." On December 12, 1969, another Vietnam Moratorium Day, petitioner again wore a black armband to class. As a result of this action, petitioner was suspended on that day and, on January 13, 1970, was dismissed in accordance

with the provisions of Education Law section 3013, subdivision 1. The pertinent part of that subdivision reads as follows:

> "Teachers shall be appointed for a probationary period of not to exceed five years . . . Services of a person so appointed . . . may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education."

Commissioners of Education, as well as the Courts, have consistently held that such probationary teachers have no vested rights to be continued in their positions and that the services of a probationary teacher may be discontinued without a hearing and without giving or explaining the reasons for such action.

> "The making of a permanent contract with tenure constitutes a long commitment that should not be incurred without the most careful consideration. The screening of candidates by the principal and district superintendent to select those whose technical training and experience make them eligible for consideration is doubtless a wise requirement of the law. On the other hand, it may well be that a teacher with satisfactory technical qualifications might have certain personal characteristics and attitudes that would prevent him from acting in harmony with his associates and fitting into the requirements of a particular school. In such a case the judgment and discretion of the board, made up of men and women of standing and experience, are most valuable safeguards in the selection of a permanent teaching staff for carrying on the work of the school. The Legislature has not seen fit to abrogate the power of the board in making permanent contracts."

(*McMaster* v. *Owens*, 275 App. Div. 506, 509.)

Appendix 2

(*Peo. ex rel. Graves* v. *Barber,* 193 Misc. 326; *Carter* v. *Kalamejski,* 275 App. Div. 604, affd. 280 N. Y. 803; *Walcott* v. *Fisher,* 274 App. Div. 339, affd. 299 N. Y. 688; *Hickey* v. *Carey,* 275 App. Div. 949; *Board of Education* v. *Allen,* 283 App. Div. 376; *Pinto* v. *Wynstra,* 22 AD 2d 914; Matter of Coleman (1920), 22 State Dept. Rep. 322; *Matter of Coleman,* 69 *id.* 20; *Matter of Sullivan,* 74 *id.* 52; *Matter of McIntyre,* 2 Ed. Dept. Rep. 197; *Matter of Butler,* 6 *id.* 71, affd. 29 AD 2d 799; *Matter of Nazzaro,* 7 *id.* 31; *Albaum* v. *Carey,* 310 F. Supp. 594.)

The essence of the appeal, however, rests in petitioner's claim that his dismissal was in violation of his constitutional rights.

Petitioner alleges that by wearing a black armband he was exercising his right of free speech under the First Amendment to the United States Constitution, and contends that, by dismissing him respondent has violated this Constitutional right. Petitioner seeks an order reinstating him to his former position with back pay from the date of his dismissal, and directing respondent not to suspend or dismiss him in the future without just cause shown.

Respondent alleges that the wearing of the black armband in class was a political act expounding to the students only one side of a controversial issue and, as such, constituted an unethical practice by a member of the teaching profession. Respondent further alleges that, by wearing a black armband a second time, despite a reasonable direction by respondent not to do so, petitioner was guilty of insubordination. For these reasons respondent contends that its dismissal of petitioner was justified.

Appendix 2

While I fully agree that a board of education has broad powers over a probationary teacher and may dismiss a probationer without giving a reason, the exercise of these powers by a board must be made "within the ambit of the purpose for which they were granted and in a manner consistent with our basic Constitutional framework" (*Matter of Collins*, 9 Ed. Dept. Rep. ____, Decision No. 8051 dated August 26, 1969). Therefore, where it is established that a probationary teacher is dismissed for reasons which may be violative of his Constitutional rights, the mere fact that the procedural requirements of section 3013 have been met will not render an appeal from such a dismissal moot, and a determination of the legality of such action is in order. Respondent's allegation in this regard must therefore be rejected.

Respondent's allegation that petitioner was insubordinate for failing to adhere to its directive not to wear the armband has merit only if the directive was a reasonable exercise of the Board's authority. If respondent's directive violated petitioner's rights, the directive would be unconstitutional and illegal and petitioner's failure to abide by such a rule could not constitute a ground for disciplinary action. The real issue before me then concerns the right of a school teacher in class to wear a black armband which is expressive, though only symbolically, of a specific viewpoint.

Petitioner's position is based largely on the dictum in *Tinker* v. *School District*, 393 U. S. 503, a case dealing solely with the right of *students* to wear the black armband, that (p. 506):

> "It can hardly be argued that either students *or teachers* shed their constitutional right to freedom of speech or expression at the school house gate." (Emphasis supplied.)

No decision of the United States Supreme Court has been found, however, addressing itself directly to the question of the right of teachers to express themselves freely in the classroom on any subject they please, regardless of any relationship between such expression and subject the teacher is engaged to teach.

The *Tinker* decision itself, however, contains other significant language (p. 506):

> "First Amendment rights, *applied in light of the special characteristics of the school environment,* are available to teachers and students." (Emphasis supplied.) ". . . the Court has repeatedly emphasized the need for affirming the comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to *prescribe and control conduct* in the schools . . . Our problem lies in the area where *students* in the exercise of First Amendment rights collide with the rules of the school authorities." (Emphasis supplied.)

Most important, however, is the following passage from the majority opinion in *Tinker* (p. 508):

> "*Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students.*" (Emphasis supplied.)

In *Tinker,* however, the Court also recognized that free speech is subject to regulation when it stated:

> "*We properly read it* [the Constitution] *to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.*" (Emphasis supplied.)

Appendix 2

The Court, even before its decision in *Tinker*, had recognized that although a person had no Constitutional right to public employment, Constitutional protection does extend to public employees whose continued public employment is subject to only reasonable, lawful and nondiscriminatory regulations (*Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Higher Education*, 350 *id.* 551). And, as I stated in *Collins:*

> "Absent an overriding public interest regulations which impinge upon individual freedom can have no legal force."

The closest precedent for the present case is the decision of the United States Court of Appeals for the District of Columbia Circuit in *Goldwasser* v. *Brown*, 417 F. 2d 1169, which, like the present case, involved a teacher of English who insisted on discussing foreign policy and matters of racial prejudice in his classes. In upholding the dismissal of that teacher against his claim of interference with his right to free speech, the Court stated (after noting that the public school teacher in *Pickering*, 391 U. S. 563, was not dismissed for anything he said *in* class):

> ". . . appellant was fired for what he said *within* the classroom to foreign officers who were supposed to be learning how to cope with an English-speaking dentist or garage repairman, and not for airing his views outside the classroom to anyone who would listen."
>
> ". . . appellant was not teaching . . . current events, political science, sociology or international relations."

It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available

in relation to such subject. If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facets and phrases of the subject. Petitioner in this case, in wearing the black armband in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists.

In line with this basic concept, Dr. Herbert F. Johnson, then Deputy Commissioner of Education for Elementary, Secondary and Continuing Education, on November 3, 1969 sent a memorandum to all school administrators, dealing with "Moratorium Days" and the posture of the public schools in relation thereto. The gist of the communication was the need for neutrality and objectivity on the subject on the part of teachers and administrators, and the need for giving appropriate attention to all sides of the questions involved.

The same concepts are incorporated in the Joint Code of Ethics, adopted both by the New York State School Boards Association and the New York State Teachers Association, which specifically considers as unethical the use of schools by teachers and boards "*to promote personal views on* religion, race or *partisan politics*" and to "*deny the student access to varying points of view.*" (Emphasis supplied.)

The term "partisan politics" is not, of course, limited to the politics of political parties, but embraces any political subject on which differing views exist.

Appendix 2

It is to be noted also that the Courts arrive at the same conclusion from the constitutional point of view. Mr. Justice TITONE, of the Richmond County Supreme Court, in *Matter of Nistad*, 61 Misc. 2d 60, 64, in ordering the Board of Education of the City School District of the City of New York to conduct school as usual on Moratorium Days, stated:

> "The prestige and power of the Board of Education may not be used to support, influence or condone on matters of this nature."

Similarly, the California Supreme Court, in *Goldsmith* v. *Board of Education*, 66 Cal. App. 157, 225 Pac. 783, recognized the problem as follows:

> ". . . it is to be observed that the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office—the attempt thus to influence support of such candidate by the pupils and through them by their parents—introduces in the school questions wholly foreign to its purposes and objects . . ."

The wearing of the black armband has been declared to be symbolic speech, *i.e.*, "closely akin to 'pure speech' " and "the type of symbolic act that is within the freedom of speech provision of the First Amendment" (*Tinker*, *supra*). It follows that such symbolic speech, in the classroom, is a form of teaching and is subject to the strictures of sound pedagogy. The Court of Appeals in *O'Connor* v. *Hendrick*, 184 N. Y. 421, 428, in which the Court held improper the wearing of religious garb by a teacher in a public school classroom, made the following observation:

> "So, also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils, as, for example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July." (p. 429.)

It should be noted that much broader limitations on First Amendment rights have been sustained by the United States Supreme Court (see *United Public Workers* v. *Mitchell*, 330 U. S. 75).

As the Supreme Court stated in *Barnette* (319 U. S. 624, 637):

> "Free public education if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction."

Since the actions of appellant were contrary to sound educational principles, and since those actions were not constitutionally protected in the circumstances of this appeal, the action of the respondent in terminating appellant's probationary appointment must be sustained.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, EWALD B. NYQUIST, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department at the City of Albany, this 23rd day of September 1970.

(SEAL.) EWALD B. NYQIST.

APPENDIX 3

June 9, 1972

Hon. Henry J. Friendly
Chief Judge
United States Court of Appeals
United States Court House
Foley Square
New York, New York 10007

Re: *James* v. *Board of Education et al*
Docket No. 72-1109
Cal. No. 697

Dear Judge Friendly:

This letter is written on behalf of the New York State Commissioner of Education who has appeared throughout as *amicus curiae* in the above entitled matter.

We urgently support the petition for a hearing *in banc* which has been or will be filed by the board of education of the Addison Central School District, Steuben County, New York, Appellees.

We strongly feel that the decision of the Court, rendered May 24, 1972, is directly contrary to sound educational principles and will have serious adverse effects on the New York State school system. It is directly contrary to the Code of Ethics adopted jointly by both the New York State School Boards Association and the New York State Teachers Association, and directly contrary to specific directives issued to all school districts by the New York State Education Department.

It is our view that this decision would open the door to political indoctrination in the State's classrooms.

Appendix 3

When the Court says:

> "There is no suggestion whatever that his [James'] armband interfered with his teaching functions . . ."

and

> "It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the board of education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools *which reasonably may be expected to interfere with the educational process.*" (Emphasis supplied.)

it is clear that the Court misapprehended the nature of the educational process. It is exactly the act of (1) teaching only one of several views of a highly controversial subject and (2) teaching in a field in which he has no demonstrated competence which does, in and of itself, interfere with the educational process, which is the heart of the problem here.

We are deeply disturbed by the holding throughout the decision that only "disruption" and "incidents or threats to school discipline" can be a proper basis for action by a board of education. It is the teaching function itself with which we are concerned rather than any question of discipline or possible disruption. It is submitted that such an approach would divest boards of education of control over the very core of their functions.

We are, further, greatly disturbed over the Courts sanctioning a procedure where a State *judicial* tribunal (see New York Education Law sections 310, 207) renders a judicial decision, based on the filing and service of pleadings, memoranda of law and an oral argument (characterized inaccurately by the Court "as we were informed at the argument of this appeal" as "no more than an informal

round-table discussion between the Commissioner, the parties and their attorneys"), and the same petitioner, represented by the same counsel ignoring such procedure and decision, proceeds *de novo* in the Federal Court. It is submitted that from the standpoint of proper Federal judicial procedure and jurisdiction, such a decision may not be collaterally attacked in such fashion. Either the petitioner should seek to review the Commissioner's decision in the State Courts and then appeal from them to the United States Supreme Court; or the petitioner should seek review of the decision directly in the Federal Courts. In either case the record, on the basis of which the Commissioner's decision was rendered, would be before the Court. To sanction such an improper approach to the judicial function would have a chilling effect on any use of any State procedures, and ignores the fundamental principle of *res judicata*.

We are, finally, greatly disturbed by the repeated references by the Court to wholly nonexistent facts for which there is no basis whatever in the record. The Court says:

> "We cannot countenance school authorities arbitrarily censoring a teacher's speech *merely because they do not agree with the teacher's political philosophies or learnings*".

There is not one scintilla of evidence in the record to support such a statement. In fact, it is our understanding that both the board of education and the administration are divided on these issues, and it is for this very reason—to be sure that the students will not be proselytized one way *or the other* but will be given the whole picture, with all sides explained in the class and at the time when the subject is properly reached for discussion—that strict neutrality was and is required of teachers by the board of education.

Appendix 3

When the Court says:

> "Clearly, there was no attempt by James to proselytize his students",

we can only ask for what other reason he could possibly have worn the armband *to class*?

It can hardly be maintained that limiting an English class to the teaching of English or a mathematics class to the teaching of mathematics, imposes a "pall of orthodoxy" on the students.

Nor can such a "pall of orthodoxy" be found where a school insists that students be acquainted with all sides of a given subject, and only by the teacher charged with, prepared for, and expert in, the subject involved, whatever it may be.

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction". (*West Virginia* v. *Barnette*, 319 U. S. 624, 637.)

We think the Court went far afield indeed when it said:

> ". . . as far as we know [James' armband] *did not have any influence on any students* and did not engender protest from any student, teacher or parent". (Emphasis supplied.)

For one thing the record is wholly devoid of evidence on this question, and, more importantly, since students are told to look up to, emulate, and be guided by their teachers, the influence of such expressions of political views of teachers on students is almost impossible to gauge especially within the confines of a lawsuit. This is particularly true where no opportunity for discussion exists—the subject of the teacher lying in other fields.

For all the foregoing reasons, *amicus curiae* respectfully supports the motion of appellees for a rehearing *in banc*.

Respectfully,

JOHN P. JEHU
Attorney for Commissioner of Education, Amicus Curiae
Education Building
Albany, New York 12224

Of Counsel
ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs
Education Building
Albany, New York 12224

cc: Burt Neuborne, Esq.
84 Fifth Avenue
New York, New York 10011
Attorney for Appellant

Harry Treinin, Esq.
11 East Market Street
Corning, New York 14830
Attorney for Appellee

Hon. A. Daniel Fusaro
Clerk
United States Court of Appeals
United States Court House
Foley Square
New York, New York 10007

JPJ:sh

APPENDIX 4

72-1109

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHARLES JAMES,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION, CENTRAL DISTRICT #1 of the Towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTED; STEUBEN CITY, NEW YORK, EDWARD BROWN, District Principal, Central District #1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District #1,
Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judges HAY and MULLIGAN dissent. The order of July 3, 1972 is vacated.

HENRY J. FRIENDLY
Chief Judge

July 12, 1972.

Received
Jul 18 1972
Office of the
Counsel

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-564.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

Motion for Leave to File Out of Time Petition for Rehearing.

HARRY TREININ,
Attorney for Petitioners,
11 East Market Street,
Corning, N. Y. 14830
607 962-3167.

In The

District Court of the United States

October Term, 1972.

No. 72-564.

The Board of Education of Central District No. 1 of the Towns of Addison, Cameron, Rathbone, Tuscarora, Woodhull, Thurston, Erwin, Lindley and Canisteo, Steuben County, New York; Edward J. Brown, District Principal, Central School District No. 1; Carl Pillard, Principal, Addison High School, and Robert Andrews, President of the Board of Trustees of Central District No. 1.

Petitioners.

against

Charles James.

Respondent.

Motion for Leave to File Out of Time Petition for Rehearing.

Petitioner respectfully moves for leave to file the petition for rehearing on the order of this court denying the petition for writ of certiorari in this case entered on December 4, 1972. The mandate of the court was received by the undersigned counsel for petitioner on December 8, 1972.

That within the next few days, undersigned received a call from Dr. John P. Jehu, Associate Counsel for the New York State Education Department, suggesting that the Department considered it advisable to consider the filing of a petition for rehearing in this case. A meeting was arranged to be held in Albany on December 15, 1972.

At that meeting, Dr. Jehu explained to the undersigned that the Education Department felt very strongly that the integrity of the judicial system established by New York State to resolve questions arising in the administration of the New York Public School System was jeopardized by the decision of the court below, that it gave sanction to the bypassing of decisions of the Commissioner of Education by those who petitioned him for relief and were disappointed in his determination. Dr. Jehu agreed to furnish undersigned with a résumé of his arguments.

Dr. Jehu's communication, dated December 26, 1972, arrived in the office of undersigned on December 28, 1972. Undersigned had an out-of-town appointment on December 29, 1972, and the first opportunity he had to read the submitted citations in the County Library was on January 2, 1973. He prepared the petition and forwarded it to the printer on January 3, 1973. On January 8, 1973, undersigned received a call from the Clerk of the Court calling attention to the fact that the petition was not timely filed.

Although the petition for rehearing was filed a few days late, it is respectfully requested that in the interests of justice, the court entertain the petition and the supporting statement of the *amicus curiae*.

Respectfully submitted,

HARRY TREININ,
Counsel for Petitioner,
11 East Market Street,
Corning, New York 14830

LE COPY

FILED
JAN 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-564.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,
Petitioners,

against

CHARLES JAMES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

HARRY TREININ,
Attorney for Petitioners,
11 East Market Street,
Corning, N. Y. 14830
607 962-3167.

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IN THE

Supreme Court of the United States

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

No. 72-564

PETITION FOR REHEARING.

The petitioners herein respectfully move this court for an order (1) vacating its denial of the petition for Writ of Certiorari entered on December 4, 1972; and (2) granting the petition.

As grounds for this motion, petitioners state the following:

I.

The full faith and credit clause of the United States Constitution (Article IV, Section 1) requires that the decision of the Commissioner of Education of the State of New York be accorded full faith and credit in the courts of the United States.

After his dismissal, Mr. James brought a proceeding before the Commissioner of Education of the State of

New York pursuant to Section 310 of the New York State Education Law seeking reinstatement.

The proceeding was instituted by formal verified petition prepared by his attorneys. The School Board and the other parties replied by an answer.

At a hearing held before the Commissioner at which Mr. James was represented by one of the counsel who appears for him in the Federal Court proceeding, full argument was made on the disposition of his contentions. Mr. James' petition was denied. He did not appeal or seek review of the decision. Neither did he make the Commissioner a party to the new action he instituted in Federal Court.

The Commissioner of Education is a constitutional officer of the State of New York. (New York State Constitution Article V, Section 4.)

The Education Law (Section 207) refers to the *judicial* functions of the Commissioner of Education. Such functions have been exercised by the Commissioners of Education and their predecessors in New York since 1822 (Laws of 1822, Chapter 256).

The New York Court of Appeals has determined that a decision of the Commissioner of Education is subject to review only in the event it is purely arbitrary and no reasonable person can agree with him on the record before him (*Board of Education v. Allen,* 6 N. Y. 2d 127).

In matters involving educational policy, the New York Court of Appeals has held that such policy decisions are not subject to review at all. *Vetere v. Allen,* N. Y. 2d 259.

It is in the light of that background that the determination of the Commissioner must be read and the following statement in his decision be judged:

> "It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all the facets and phases of the subject.
>
> "Respondent, in this case, in wearing the black arm band in his classroom, was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists."

Since, Mr. James did not seek to review the Commissioner's decision, which he had a perfect right to do, but proceeded in an entirely new action and in a different forum without making the Commissioner a party to the litigation.

Thus, in effect, the court below has formulated its own opinion to supplant the determination of the Commissioner in regard to the educational policy of the State of New York and, in doing so, has given no force or effect to the determination.

II.

The doctrine of collateral estoppel requires that the determination of the Commissioner of Education be sustained.

In *United States v. Silliman*, 167 Fed. 2d 607, the court considered the effect of a New York State Surrogate Court proceeding in the case before it. No opinion was filed in the Surrogate Court nor any findings of fact or conclusions of law filed. Nevertheless, it was determined that the decision in the Surrogate Court was conclusive in the Federal Court.

There the court stated,

> "Nevertheless, we think the record is complete, for it recites points made in the pleadings and the action of the Court upon them. This is not a situation where the record is devoid of information and needs outside evidence to explain what went on. The Government took no appeal. Therefore, whether the conclusion of the learned Surrogate was right or wrong is not now a question which is open to litigation."

It is submitted that the decision of the Commissioner is replete with the factual background of the case and the contentions made by all the parties at the hearing before the Commissioner.

The determinative consideration is stated by the court,

> "We think, further, that the public policy of holding parties to one day in court is one which has recently found firm support and sound extension by the court whose authority binds us. We should not be looking for an opportunity to impose any but the most important limitations on that policy." Page 619.

The decisions quoted by the court in footnote 48 on that page amply sustain that proposition.

To the same effect is the decision in *Magnolia Petroleum Company v. Hunt*, 320 U. S. 430. There, at page 443, the court states,

> "Whether the proceeding before the State Industrial Accident Board in Texas be regarded as a 'judicial proceeding' or its award 'a record' within the meaning of the full faith and credit clause and the act of Congress, the result is the same. For judicial proceedings and records of the State are both required to have 'such faith and credit given to them in every court within the United States as they have by law and usage in the courts of the state from which they are taken.'
>
> "The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and a fortiori, he cannot divide the grounds of recovery."

It is respectfully submitted that no distinction can be drawn between the finality to be given a fully pleaded and argued determination by the Commissioner of Education of the State of New York or the decision of an accident board acting under the Texas Compensation Law.

In *Sunshine Anthracite Coal Co. v. Atkins*, 310 U. S. 381, the same determinative effect was given to a decision of an administrative tribunal.

There, at page 404, the court states,

> "Furthermore, where, as here, Congress has created a special administrative procedure for the

> determination of the status of persons or companies under a regulatory act, and has prescribed a procedure which meets all the requirements of due process the remedy is exclusive."

The same principles are reiterated in *Midessa Television Co. v. Motion Picture, etc.*, 290 F. 2d 203, 5th Cir., cert. den. 368 U. S. 827, where the court stated,

> "There is no better settled principle in the law that a judgment for the merits in one suit is *res judicata* in another where the parties and the subject matter are the same not only as respects matters actually presented to sustain or defeat the right asserted, but also as to any other available matter which might have been presented." *Cromwell v. County of Sack*, 94 U. S. 351.

Later, the court states that

> "Defendant, having voluntarily chosen not to assert any defenses in the New York proceeding is foreclosed from asserting them now. Such matters are *res adjudicata* and a New York judgment must be given full faith and credit." Page 204.

> "• • • the appellee had every opportunity to litigate the case in New York. It failed through its negligence or deliberate omission to do so and was not prevented from doing so by any act of appellee and it may not litigate the issues in a collateral attack upon the judgment." Page 215.

That is exactly what Mr. James did here. Having litigated the matter almost exclusively on the due process question, he now seeks to relitigate the issues, stressing the alleged infringement of his religious rights, matters which he could have fully developed before the Commissioner of Education.

The situation existing is well summed up in *Wayside Transportation Company v. Marcell's Motor Express, Inc.*, 284 F. 2d 868. There, at page 871, the court stated,

> "Due process does not give the parties the right to litigate the same question twice. The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy. 'That there be an end to litigation: that those who have contested an issue shall be bound by the results of the contest; and that matters once tried shall be considered forever settled as between the parties.'"

III.

There is a divergence of decisions as to the effect of the decision of the Commissioner of Education. The ruling by the Second Circuit and the ruling in the *United States v. Silliman* by the Third Circuit are not in agreement.

The decision below does not give "full faith and credit" to the determination of the Commissioner of Education; neither does it apply the doctrine of collateral estoppel.

Under the ruling in the *Silliman* case, faith and credit was given and collateral estoppel was applied in a similar situation.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for Writ of Certiorari, petitioner prays that this court grant rehearing of the order of denial, vacate the order, grant the petition to review the judgment and opinion below.

Dated: January 3, 1973.

Respectfully submitted,

HARRY TREININ,
Counsel for Petitioner.

Certificate of Counsel.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

HARRY TREININ

FILE COPY

Supreme Court, U. S.
FILED
JAN 10 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 72-564

October Term, 1972

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1, CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

MOTION FOR LEAVE TO FILE STATEMENT OF COMMISSIONER OF EDUCATION, *AMICUS CURIAE*

JOHN P. JEHU
Associate Counsel
Attorney for Commissioner of Education, Amicus Curiae
State Education Building
Albany, New York 12224

ROBERT D. STONE,
Counsel and Deputy Commissioner for Legal Affairs.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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MOTION FOR LEAVE TO FILE STATEMENT OF COMMISSIONER OF EDUCATION, *AMICUS CURIAE*

Ewald B. Nyquist, as Commissioner of Education of the State of New York, hereby respectfully moves this Court for leave to file his statement *Amicus Curiae* in this cause

in support of the petition for rehearing, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for all parties hereto has been had throughout this litigation. *Amicus* has relied on this fact as shown in the record. Upon being advised, however, of the need for a further motion for leave to file said statement as *Amicus Curiae,* the undersigned immediately obtained the consent of Burt Neuborne, Esq., attorney for respondent herein who authorized the undersigned by telephone to convey the fact of his consent to the Court. Said attorney for respondent, furthermore, also authorized the undersigned to convey to the Court that said attorney for respondent waives the lack of timeliness on the part of the petition for rehearing and the correlative steps of *Amicus Curiae.* The consent of the attorney for petitioner clearly appears in petitioner's motion for leave to file out of time petition for rehearing.

The interest of the *Amicus* herein was set forth in the Brief of *Amicus* supporting the petition for a writ of certiorari, but is here limited entirely to the procedural aspect of the decision of the United States Court of Appeals for the Second Circuit. This interest is further set forth in the statement of *Amicus* tendered with this motion.

The purpose of *Amicus* herein is to protect the judicial function of the Commissioner of Education of the State of New York, which has been exercised by Commissioners of Education and their predecessors in office since 1822.

This judicial function of *Amicus* is of vital importance to the operations of the New York State School System which presently consists of 760 school districts.

Amicus is called upon to render some 150 judicial decisions each year. A body of common law is built up

through these decisions which regulate and aid the operations of the New York State School System.

If the decision of the Second Circuit is to stand, this judicial function will be gravely impaired because it would be a waste of time of the parties to such judicial proceedings before *Amicus* and a waste of time for their attorneys to go through the motions of preparing, verifying, serving and filing pleadings, traveling to Albany for oral argument and submitting lengthy memoranda of law, when the losing party in such proceedings can simply ignore the decision arrived at on the basis of such a judicial proceeding and start *de novo* in either the State or Federal Courts and have the State or Federal Courts likewise ignore the basic rule of judicial procedure that no Judge or Court can pronounce judgment against anybody who is not a party to the litigation before him or it.

This aspect of the decision of the Second Circuit goes far beyond the specific details of this litigation and seriously threatens both established judicial procedures and the New York State Education System.

For the foregoing reasons, the Commissioner of Education of the State of New York respectfully requests that this motion be granted.

Respectfully submitted,

JOHN P. JEHU
Associate Counsel
Attorney for Commissioner of Education, Amicus Curiae
State Education Building
Albany, New York 12224

ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs

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IN THE

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Statement

This Statement *Amicus Curiae* is submitted by Ewald B. Nyquist, as Commissioner of Education of the State of New York, in support of petitioners' petition for a rehearing of the Order denying the petition for a writ of certiorari herein.

Respondent James was dismissed by petitioner board of education in 1970.

He selected as his remedy the appeal to the Commissioner of Education, which was one of three remedies available to him.

The appeal was processed in due course, pleadings were filed and served by the parties, memoranda of law were submitted and an oral argument was held before the Commissioner of Education.

The decision of the Commissioner was rendered on September 23, 1970, dismissing the appeal.

Instead of seeking a review of the decision of the Commissioner adverse to him, respondent, ignoring the decision of the forum of his own choice, proceeded de novo in the United States District Court.

The Commissioner of Education was not named as a party and did not intervene as a party.

Relying on the axiomatic and fundamental doctrine of law that a Court cannot pronounce judgment against anybody who is not a party to the litigation before the Court, the Commissioner, as a courtesy to the Court submitted a Brief Amicus Curiae.

The District Court held against respondent, fully recognizing the basic law that, absent a review proceeding, the decision of the State tribunal becomes res judicata.

On appeal to the Second Circuit, however, that Court completely ignored this basic principal of law, improperly claiming that petitioners' objection and the decision of the District Court was based on a finding that Federal jurisdiction did not exist absent State Court review.

Neither the District Court nor petitioners nor Amicus, however, have given the Second Circuit any basis whatsoever for such a conclusion.

Both the District Court and petitioners and Amicus are fully aware of, and in agreement with the truism that a decision of the Commissioner can be reviewed either in the Federal Court or the State Court.

It is the crux of the position of petitioners and *Amicus*, as well as the District Court, that the doctrine of collateral estoppel as well as the Full Faith and Credit Clause of the United States Constitution prevent the raising of the same issues in an independent Federal action which issues have been completely litigated in a State tribunal of competent jurisdiction.

The intervening circumstances of substantial effect required by Rule 58 of the Rules of this Court are found in a decision of a State Supreme Court Justice rendered after the decision of the Second Circuit and which State Court decision, it must be presumed, is based on, the fact that the Second Circuit completely ignored the doctrines of collateral estoppel and *res judicata*. If this type of procedurally improper handling of decisions of the *Amicus Curiae* is to become the rule, obviously the entire institution of the judicial function of the Commissioner of Education, which goes back for exactly 150 years and which has been vitally instrumental in shaping the New York State school system into a State school system, will be lost, to the most serious detriment to the pupils of the State of New York.

While denial of certiorari, of course, is not tantamount to an affirmance, at the same time, for the purpose at hand, the decision of the Second Circuit becomes the law of the State of New York.

It is vital that the Court, furthermore, resolve the divergence of opinion thus created between the Second Circuit on one hand and the Third and Ninth Circuits on the other hand, as shown by the decisions hereinafter referred to.

Questions Presented

1. Does not the Full Faith and Credit Clause of the United States Constitution require the acceptance of an unappealed decision of a State tribunal of competent jurisdiction in subsequent independent litigation of the identical issues in a Federal Court?

2. Does not the doctrine of collateral estoppel prevent a Federal Court from rendering a new decision in *de novo* litigation of issues already fully litigated and decided by a State tribunal of competent jurisdiction, but absent an appeal from, or review proceeding against, such State tribunal's decision?

3. Is it not axiomatic that a Court cannot render a decree against a person not a party to the litigation in which the decree is rendered?

4. Should not this Court set at rest a divergence of opinions between the Second Circuit on one side, and the Third and Ninth Circuits on the other?

ARGUMENT

POINT I

The full faith and credit clause of the United States Constitution.

Article IV section 1 of the United States Constitution requires all Federal tribunals to give full faith and credit to unappealed decisions of any State tribunal of competent jurisdiction relating to issues which were fully litigated before such tribunal, as well as those which could have been litigated in such form, but were not:

Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430.

Consequently, the decision of the Second Circuit herein is void against all parties:

U. S. v. *Silliman*, 167 F. 2d 607;
Milwaukee County v. *M. E. White Company*, 296 U. S. 268, 272;
Boothe v. *Baker Industries, Inc.*, 262 F. Supp. 168;
Stoll v. *Gottlieb*, 305 U. S. 165; reh. den. 305 U. S. 675;
Midessa Tel. Co. v. *Motion Picture etc.*, 290 F. 2d 203; cert. den. 368 U. S. 827;
Wayside Transportation Co. v. *Marcell's Motor Exp. Inc.*, 284 F. 2d 868;
Case v. *Mountain Timber Co.*, 210 F. 565;
American Surety Co. v. *Baldwin*, 287 U. S. 156, 166.

"The full faith and credit clause . . . applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal court". (Many citations).

POINT II

Divergence of opinions between the Second Circuit and the Third and Ninth Circuits.

The decision of the Second Circuit herein is contrary to the decision of the Third Circuit in *U. S.* v. *Silliman, supra* and the decision of the Ninth Circuit in *Warren* v. *Lawler*, 343 F. 2d 351.

The interests of subtantial justice require that this Court settle this matter among the conflicting Circuits.

POINT III

Collateral estoppel.

The collateral estoppel provisions of *res judicata* are clearly applicable in the present case.

The strict application of the collateral estoppel provisions which are axiomatic, is, moreover, of vital importance to the judicial functions of the Commissioner of Education who has had these judicial functions since 1822. These functions were given to the Chief State School Officer in the interests of the New York State Education System and have served the school system well over the many years, in that the Commissioner of Education has built a body of "common law" for the school system of the State, which gives guidance and direction to the presently 760 school districts of the State. The Commissioner is called upon to render approximately 150 decisions per year in his judicial capacity.

This judicial function of the Commissioner is the most important tool for the cohesive structure of the State School System, placed, as it is, in the hands of the top

educational expert of the State, who is traditionally selected by the Board of Regents as the outstanding educator of the United States.

Unless this untenable decision of the Second Circuit is reversed, most grievous damage will arise to the judicial function of the Commissioner and thus to the State Education System.

The following cases clearly indicate the procedural error of the Second Circuit in the premises:

U. S. v. *Silliman, supra,*
Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. 381, 403,
U. S. v. *R. C. A.,* 358 U. S. 334, 352,
Cox v. *Kirby Lumber Corp.,* 197 F. 2d 812; cert. den. 344 U. S. 903,
Merrell v. *U. S.,* 140 F. 2d 602,
Stoll v. *Gottlieb, supra,*
Case v. *Mountain Timber Co., supra,*
Sealfon v. *U. S.,* 332 U. S. 575,
Warren v. *Lawler,* 343 F. 2d 351,
Forsyth v. *Hammond,* 166 U. S. 506.

Conclusion

For all the foregoing reasons, it is respectfully submitted that the petition for rehearing should be granted and that certiorari should be granted so that a decision of this Court on the procedural errors of the Second Circuit may be had in the premises.

The danger of other tribunals following the example of the Second Circuit herein is amply demonstrated by the decision of Mr. Justice Sullivan of the Onondaga

County Supreme Court, copy of which is attached hereto and made a part hereof as Appendix 1.

While the Justice does not specifically refer to the decision of the Second Circuit herein, that decision became immediately known throughout the State and it must be presumed that the Justice followed the example of the Second Circuit, rendered sometime prior to the Justice's decision. Such decision, it is submitted, constitutes the intervening circumstance of substantial effect referred to in Rule 58 of the Rules of this Court.

The granting of the petition for a rehearing herein, is therefore, as indicated, of vital importance to the New York State School System in areas far beyond the substantive merits of this specific case.

Respectfully submitted,

JOHN P. JEHU
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ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs

APPENDIX 1

Decision

STATE OF NEW YORK

SUPREME COURT—County of Onondaga

FRED ANKEN, MALCOLM NOBLE and KEITH TOMPKINS, on behalf of themselves and all other residents of the SANDY CREEK CENTRAL SCHOOL DISTRICT NO. 1, OSWEGO, JEFFERSON, ONEIDA and LEWIS COUNTIES, NEW YORK, similarly situated,

Petitioners,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF SANDY CREEK, ORWELL, REDFIELD, BOYLSTON and RICHLAND, OSWEGO COUNTY, ELLISBURG, JEFFERSON COUNTY, OSCEOLA, LEWIS COUNTY, and FLORENCE, ONEIDA COUNTY, NEW YORK.

Respondent.

Article 78 Proceeding to review and annul a decision of the Commissioner of Education.

Onondaga County Motion Term, September 8, 1971. Finally submitted: January 31, 1972.

Appearances:

Robert M. Weldon, Esq., Attorney for Petitioners, 131 Sherman Street, Watertown, New York.

Calvin B. Chamberlain, Esq., Attorney for Respondent, 8646 Lake Street, Sandy Creek, New York.

Appendix 1—Decision

EUGENE F. SULLIVAN, *J.*

In this Article 78 proceeding, the above named petitioners, Fred Anken, *et al.*, and all those on whose behalf they are acting, are residents and duly qualified voters of the above named respondent, Board of Education of Sandy Creek Central School, etc., District No. 1 (Board), New York. These petitioners request that this Court annul and reverse the determination and decision of the Commissioner of Education (Commissioner), which is dated June 7, 1971, with respect to an election or vote at a District Meeting heretofore held on January 15, 1971, on the proposition for which said meeting was called and held, namely:

> whether or not the construction of (1) a new school building, (2) a new bus garage, (3) a modification of an existing building, and (4) the financing thereof at a total cost of $1,952,000.00, should be authorized;

and to declare said District Meeting election to be null and void, and to order the fifteen (15) names of those who were then living at a charitable home, known as "Unity Acres", which is located in the Town of Orwell, Oswego County, in said District, and the names of those who illegally voted or were unqualified to vote at said election, be stricken from the list of qualified voters, and to order a new District Meeting to again vote on the aforementioned proposition.

The canvas of the vote at the meeting was 584 in favor and 580 against the proposition.

By its answer, the respondent alleges, in substance, that the fifteen (15) persons from "Unity Acres", who were allowed to vote, were bona fide residents of the

District and entitled to vote. (*Note*: The respondent admits that two (2) of these fifteen (14) persons, who voted, had not resided in the District for 30 days).

For a first affirmative defense, respondent alleges that the petitioners instituted the original appeal or petition in the instant proceeding, to the Commissioner, pursuant to Section 310 of the Education Law, and that the Commissioner rendered his decision which is "final and conclusive, and not subject to question or review in any place or in any court whatever", and that, as a matter of *res judicata*, the petitioners are barred from bringing this proceeding.

"• • •. While section 310 of the Education Law gives the commissioner the power to determine disputes concerning all matters under the Education Law and expressly states that his determination in such matters shall not be subject to 'question or review in any place or court whatever', the courts have *not held that this prevents a judicial review* of an arbitrary or unlawful act on his part (*Matter of Fabricius* v. *Graves*, 254 A. D. 19; *Matter of Beam* v. *Wilson*, 279 A. D. 277). • • •. However, it seems that this section (2037 of the Education Law, supplied) also forecloses review only to the extent that review is limited in a case arising under section 310 (*Matter of Colson* v. *Allen*, 285 A. D. 797, 798)."

Matter of Eaton v. *Allen*, 1 Misc. 2d 496.

"• • •. The party seeking relief may apply to the courts since the remedy under section 310 of the Education Law is not exclusive (*Matter of Leeds* v. *Board of Educ.*, 19 Misc. 2d 860, affd. 9 A. D. 2d 905)."

Mtr. Stillman v. *School Dist.*, 60 Misc. 2d 819
Affd. 34 A. D. 2d 553.

See, also:

Mtr. of Bd. of Educ. v. *Nyquist*, 60 Misc. 2d 967, 969;
Mtr. Oyster Bay v. *Nyquist*, 36 A. D. 2d 199, 201.

Under the facts in the instant case, this Court finds that the Commissioner does not have sole jurisdiction to review the action taken at the school meeting on January 15, 1971, and that the petitioners should not be deprived of valuable rights. The Court should not be ousted of jurisdiction to determine the matter, notwithstanding another method of settling the controversy has been provided.

Matter of O'Connor v. *Emerson*, 196 A. D. 807 Affd. 232 N. Y. 561.

The respondent has not made a motion to change the venue of this proceeding to Albany County. Section 504 of Civil Practice Law and Rules, subdivision 2, provides that the place of trial of all actions against a school district shall be for the county in which such school district is situate and if the district is in more than one county, in either. The instant proceeding has been instituted in Onondaga County in which no part of the district is situate. Section 506 provides that a proceeding against the Commissioner of Education shall be commenced in the Supreme Court, Albany County. However, Section 509 reads:

"Notwithstanding any provision of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511."

"Venue (or place of trial) and jurisdiction are distinct concepts and should not be confused. • • • An

error in venue is not a jurisdictional defect. • • • the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion."

7 Carmody-Wait, 2d Section 48:2.

Since the petitioners designated Onondaga County for the place of trial, and since respondent has not moved to change the venue to Albany County, respondent's objection in point of law that this proceeding be dismissed is overruled.

With regard to respondent's objection, in point of law, that the Commissioner should be a party to this proceeding, it will be noted that the instant proceeding is against the Board of Education. It will be recalled that an unsuccessful endeavor was made to have the Commissioner become a party to this proceeding.

However, this Court received an affidavit by James H. Whitney, sworn to December 14, 1971, wherein he states that he is an attorney associated with Robert D. Stone, Esquire, counsel to the Commissioner of Education and that his affidavit is "made as a courtesy to the Court and should be considered in conjunction with the answer of respondent" and that "the Commissioner of Education does not seek leave to appear *amicus curiae* and does not wish this affidavit to be considered within that capacity."

This affidavit sets forth, upon information and belief, eight defenses or objections to the petition. These are similar to the objections and denials in respondent's answer. Thus, the Commissioner's views have been presented to the Court. They add nothing to those of the respondent.

It would seem that, if the respondent deemed the Commissioner a necessary or "desired" party, it could have moved the Court to join him as one.

The respondent's objection in point of law that the Commissioner of Education has not been made a party to this proceeding is overruled.

The facts presented to the Court, in this proceeding, were by petition, answer and affidavits.

Turning to the facts herein, the petition to the Commissioner on the appeal states that the qualifications for voters at the subject meeting are that they be (1) 21 years of age, (2) citizen of the United States, (3) resident of the District for one month or more immediately preceding the date of the special District Meeting.

In paragraph "11" of this petition, there are set forth fifteen (15) names of individuals living at "Unity Acres" at the time when they voted at the District Meeting on January 15, 1971.

In paragraph "10", it is alleged that petitioner, Anken, attempted to challenge the votes of these fifteen (15) persons specifically stating that they were guests at "Unity Acres", and that an agent of the School Board told Anken that he couldn't do anything about it. That these people were within the law inasmuch as they were residents of the School District for thirty (30) days. That the agent for the School Board present at the polling place, failed to provide or offer Anken the proper form for registering his challenge.

In paragraph "13" of this petition to the Commissioner, a hearing was requested by the petitioners, at which hear-

ing witnesses would be produced and oral arguments heard "as to the qualifications of the people who were permitted to vote at the District Meeting on January 15, 1971, including among others those who are 'guests' at Unity Acres, Orwell, New York", and further "That a recanvass and recount of said votes and ballots of said District Meeting on January 15, 1971, be made".

In its answer to the petition to the Commissioner, the respondent requests an opportunity for oral argument before the Commissioner in the event a hearing is granted.

The further allegation of petitioner Anken is that the official of the School District made no attempt to check whether or not these people from "Unity Acres" were proper residents of the District for voting purposes (*Note:* apparently there had not been a registration previous to the election).

By answer to the petition to the Commissioner, John T. Crichton states, in his affidavit, that he was appointed by the Board as chairman of the January 15, 1971, Special District Meeting, and he further stated:

> "That during the course of the time when the polls were open for the vote I was approached by Fred Anken. Mr. Anken had a long conversation with me during which he requested information regarding eligibility of the people residing at a place in Orwell called Unity Acres to vote on the proposition. I informed Mr. Anken that to be eligible they must be a citizen of the United States, at least twenty-one years of age, and a resident of the School District for thirty days or more, and that to the best of my knowledge these people met these qualifications. I told him there was nothing we could do about the persons who had already voted, but that we had available the necessary Declaration for use in the event a voter was challenged

and I went to the table where the ballot box was resting, picked up the Declaration sheets and showed them to Fred Anken. I told him that he had the right to challenge any votes if he wished, but that the voter had to be challenged before voting. I also told him that if a voter signed the necessary Declaration he could still vote, but if it turned out that he was not qualified to vote, he would be subject to a fine and penalty. Mr. Anken informed me that he did not wish to challenge, but that he thought that the qualifications for voting were not fair to taxpayers. I told him there wasn't anything I could do about that."

Thus, a question of fact arises as to what occurred at the election-meeting on January 15, 1971, between Anken and Crichton and others present.

Also, there arises a question of fact as to the purpose and manner of operation of "Unity Acres".

(See: Rev. McVey affidavit, dated: March 1, 1971.)

There is a question of fact as to the residency of the fifteen (15) named voters and others who voted at the election, and their qualification to vote.

These questions must be resolved at a hearing,—not on affidavits.

The probability that the results of the election would have been changed by the elimination of illegal votes cannot be determined until the results of a hearing are available.

This Court annuls the determination of the Commissioner and declares the said district meeting election to be null and void.

Order accordingly.

Dated: Fulton, New York, June 21, 1972.